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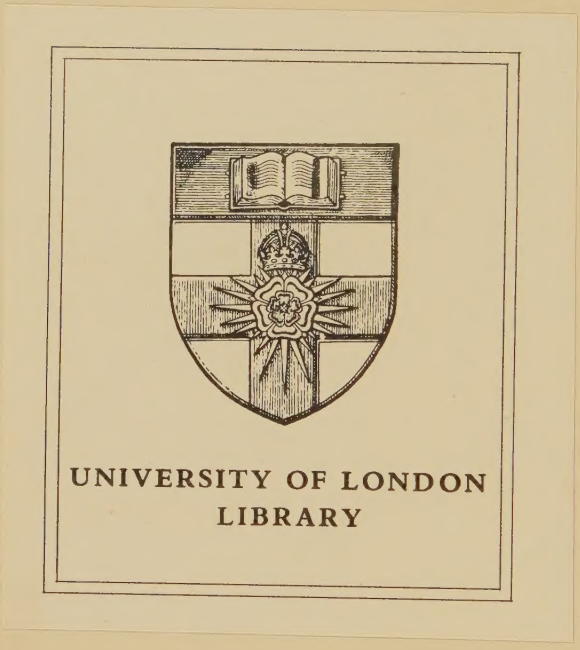

Edward Stuart
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1876

THE

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THE

LAW REPORTS.

Scotch and Divorce Appeal Cases

BEFORE THE

HOUSE OF LORDS.

REPORTED BY J. F. MACQUEEN, QUEEN'S COUNSEL.

VOL. II.

SESSIONS 1870-1-2-3-4-5.

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ERRATA.

Page 288, line 6 from top, *for* "Mr. *Traiver*," *read* "Mr. *Trayner*."
„ 354, line 4 from top, *add* to Appellants' counsel "Mr. *Orr Paterson*."
„ „ line 10 from top, *add* to Respondents' counsel, "Mr. *R. V. Campbell*."

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Appeal Cases

BEFORE

THE HOUSE OF LORDS.

SCOTCH AND DIVORCE APPEALS.

JOHN A. CAMPBELL'S TRUSTEES AND EXECUTORS . . . . . } APPELLANTS;

THE POLICE COMMISSIONERS OF LEITH RESPONDENTS.

1870
Feb. 28.

General Police and Towns Improvement Act, 25 & 26 *Vict. c.* 101 (1862)—*Private Street—Notice required—The Litigation censured.*

Where any private street, or any part thereof, is not levelled, paved, causewayed, and flagged to the satisfaction of the Commissioners, they are authorized to remedy the evil at the expense of the owner; but they must be careful to give the special preliminary notice required by the 397th section of the Act:—

Held, by the House (agreeing with the Lord Ordinary, and reversing the decree of the Inner House), that a notice under the 394th section was insufficient.

Censure of a seven years' litigation, and disallowance of costs on both sides.

Per THE LORD CHANCELLOR:—I think there should be no allowance of expenses either here or in the Court below—both parties having been in the wrong.

ON the 17th of August, 1863, Mr. *John Archibald Campbell* applied to the Court of Session for an interdict to restrain the baillies and town council of *Leith* from interfering in any way with certain property of his situated within the burgh, and known as *Prince Regent Street*.

1870

CAMPBELL'S TRUSTEES AND EXECUTORS v. POLICE COMMISSIONERS OF LEITH.

The Respondents, as Commissioners under the *General Police and Towns Improvement Act*, had posted a notice in *Prince Regent Street* intimating their intention to level, pave, and otherwise improve it, the operation being one involving a considerable expense, which must ultimately fall on the owner, the property being private.

The intended operation was to be, in pursuance of the 150th section, applicable to persons who have "neglected" their streets; and it was also to be in pursuance of the 151st section, which makes such negligent persons liable for the costs, charges, and expenses which their negligence occasions.

The Lord Ordinary granted the interdict sought by Mr. *Campbell;* and did so on the ground that the notice of the intended works was insufficient,—being merely a compliance with the 394th section of the Act, which requires little more than the posting of a general intimation in a conspicuous part of the street; whereas the Commissioners' notice ought, in the Lord Ordinary's opinion, to have been in conformity with the 397th section, which requires a newspaper advertisement, or a communication by post, or a personal notification "to the individuals having interest." In a note the Lord Ordinary (1) gave it as his opinion that sect. 394, on which the Commissioners had acted, "applied only to public streets, and not to a private street at all."

Against His Lordship's decision, however, the Commissioners reclaimed to the First Division of the Court of Session, who, on the 21st of June, 1866, after arriving at the conclusion that *Prince Regent Street* was a private street within the meaning of the Act, found "that a notice under the 397th section was not required."

Their Lordships, therefore, altered the Lord Ordinary's interlocutor, and recalled the interdict which he had granted. Hence this appeal, presented to the House by Mr. *Campbell;* but now prosecuted by his trustees and executors.

Sir *Roundell Palmer*, Q.C., Mr. *Anderson*, Q.C., and Mr. *Pattison*, appeared for the Appellants.

Mr. *Mellish*, Q.C., Mr. *Jessel*, Q.C., and Mr. *David Maclachlan*, for the Respondents.

(1) Lord *Ormidale.*

At the conclusion of the arguments on behalf of the Respondents, their Lordships delivered judgment as follows:—

THE LORD CHANCELLOR (1):—

My Lords, the notices required are by the 394th or the 397th sections of the Act; and the question is, whether, this being a private street, a notice under the 394th section is sufficient.

It appears sufficiently plain in considering the 150th and the 151st sections, that the 150th speaks of a duty which has been neglected by the owners—a duty which they ought to have performed—namely, paving and levelling and flagging the road which they have, for their own purposes, made in front of their property.

As to charging the owners or occupiers with the expense incurred, it appears to me that this is a case which falls precisely within the very words of the 151st section, as well as within its spirit. The Commissioners may, therefore, make a demand on the owner, if there be but one, or make a rate if there be more owners than one.

The 397th section says that

> The Commissioners shall, where not otherwise hereby directed, give notice of their intention to do or perform, or to authorize to be done or performed, such matter or thing, either by public advertisement in some newspaper circulating in the burgh, or in the county in which the burgh is situated, or by posting handbills in conspicuous places in the burgh, or by notice in writing, to be transmitted through the post-office, or delivered personally, or at their dwelling houses, to the individuals having interest, as the Commissioners shall think proper.

The case, therefore, is one of an ordinary class, with which we have had a good deal to do in the course of the decisions which have taken place with respect to the powers of public bodies intrusted with the execution of a duty involving on their part large powers, which powers may affect most seriously the interests of those who are subject to their jurisdiction. In all matters regarding their jurisdiction, they are, of course, allowed to exercise those powers according to their judgment and discretion; but where they exceed those powers they are immediately arrested by interdict or by injunction, it not being a sufficient answer on their part to say, "You have your remedy at law." The Courts will hold a strict hand over those to whom the Legislature has intrusted

(1) Lord *Hatherley*.

1870

CAMPBELL'S TRUSTEES AND EXECUTORS v. POLICE COMMISSIONERS OF LEITH.

large powers, and take care that no injury is done by an extravagant assertion of them.

On the whole, I advise your Lordships to make a judicial declaration that the notice given by the Commissioners ought to have been in conformity with the requisitions of the 397th section of the Act, whereas the notice actually given was not such a notice. And on this ground I propose to reverse the decision of the Inner House, and affirm so much of the interlocutor of the Lord Ordinary as interdicts the Respondents from acting upon or carrying into execution the resolution of the Commissioners; and I think there should be no allowance of expenses either here or in the Court below, both parties having been in the wrong—the Respondents in respect of their attempt to do the acts complained of without due notice, and the Appellants by having introduced a vast amount of confusion into their pleadings, and having been also clearly in the wrong as regards a considerable portion of the case made on the original application.

I humbly move your Lordships that the interlocutor of the Court below be reversed, with the declaration I have proposed.

LORD CHELMSFORD :—

My Lords, I entirely agree with my noble and learned friend.

LORD WESTBURY :—

The Appellant argued that this was a public street. That was not consistent with his pleadings; so that, as against the Commissioners, he is estopped from denying that it is a private street. With regard to the rate for the contemplated improvement, I think it should be a private improvement rate; and therefore the case comes within the 397th section. On that ground, and on no other, your Lordships will reverse the interlocutors of the Court of Session. I, however, regret very much that the ratepayers will have to pay the expenses of a most improper and unpardonable litigation.

LORD COLONSAY —

I concur with your Lordships; and I shall only say with reference to a view suggested by one of the Judges in the Court

below, as to the probability of this being a proceeding which fell under the rule of what is called "district assessment," that, after a careful examination, I do not find the expression "district assessment" anywhere in the statute as applicable to improvements to be performed under the 150th section. Therefore I think "district assessment" is out of the question in the present case.

Then we have to consider whether the notice here ought to have been a notice under the 397th section or under the 394th section, or whether there need have been any notice at all. It is very difficult to suppose that such proceedings as these were intended to be authorized without any notice at all. Where such proceedings are of the nature of improvements of a private street, one would naturally expect to find, from the manner in which the expenses are to be defrayed, that they were to be comprehended under the assessment for private improvements; but the 394th section relates to a limited class of operations, not comprehending all that is directed to be performed under the 150th section. I cannot hold that the 394th section was the proper section under which to give notice. Where it is a matter in which several parties are interested, I think the provisions of the 397th section are very important, in order that all parties, both owners and occupiers, may find out how far their interests are involved. But the 394th section, unless you do extreme violence to its words, appears to be applicable to public streets, and not to comprehend operations to be performed under the 150th section.

The declaration proposed by the Lord Chancellor adopted by the House (1).

Solicitor for the Appellants: *William Robertson.*
Solicitors for the Respondents: *Simson & Wakeford.*

(1) The case as decided below is fully reported in the 3rd Ser. Scotch Cases, vol. iv. p. 853, and in the Scottish Jurist, vol. xxxviii. p. 445.

1870 TENNENT . . . . . APPELLANT;
March 15. TENNENTS . . . . . RESPONDENTS.

Presumption of Individual Competency.

8 Ch 486

It is not easy to overcome the presumption that a man of mature age, who has long acted as a legal practitioner, is competent in an ordinary transaction to take care of himself, though unassisted by counsel. But there is an equity which in certain circumstances will give relief even to such an individual.

Family Arrangement.

Thus in a family arrangement where near relatives—some having authority—contract with each other, a high and punctilious probity will be expected; and equity will interpose to do justice on very moderate indications of laxity.

Per LORD WESTBURY:—In family agreements it is required that there shall be on all sides *uberrima fides.*

Inadequacy of Consideration.

Per LORD WESTBURY:—There is an equity which may be founded on gross inadequacy of consideration, where it involves the conclusion that the complainant either did not understand what he was about, or was the victim of some imposition. But in the present case there is nothing to warrant either of these deductions.

Scotch Statute of 1696, *c.* 25.

Circumstances under which it was held that this statute did not prevent the reception of oral evidence.

THE notable brewery of *Well Park*, near *Glasgow*, was established by an ancestor of the *Tennent* family upwards of a century ago. It has prospered ever since, and is represented now as yielding a clear income varying from £60,000 to £70,000 a year.

The question in the present case was, who should be deemed the owners, and enjoy the produce, of this lucrative concern?

It appeared that in 1855 *Hugh Tennent*, being then the sole proprietor of the brewery, and well advanced in life, sold it to two of his sons, *Gilbert* and *Charles*, for £214,000,—the price to be paid out of the profits as they should arise.

In pursuance of this arrangement a deed was executed on the 12th of September, 1855, whereby the father handed over the business to his sons equally; he, however, retaining still a right of superintendence and control over the management.

There was in the deed a stipulation that *Gilbert* and *Charles*, until they had performed their obligations, should not enter into any business unconnected with the brewery, which accordingly was thenceforth conducted by the two brothers as partners till the end of 1857, when it turned out that *Gilbert*, by reason of private speculations, was involved in pecuniary difficulties, which compelled him to ask assistance from his father and from his co-partner. The father undertook to clear off his debts,—which amounted to £8,785,—but on certain conditions—the most important of which was, that his insolvent son should be removed from the brewery.

On the 11th of January, 1858, a deed was executed by the father and his two sons, whereby the father undertook to pay all *Gilbert's* debts, *Gilbert* ceasing to be a partner in the brewery, which thereupon became vested in *Charles* exclusively; the deed, however, declaring that if after two years it should appear that *Gilbert's* liabilities were satisfied, his father "should have power to restore him to his place and position" as a partner. And in the event of the father's death before the expiration of the two years, his trustees were to have a similar power of restoration, but only with the consent of the younger brother *Charles*.

In the event of non-restoration *Gilbert* was to receive £35,000. He assented to this arrangement, and continued in the counting-house working as a clerk, at a salary, but not harmoniously, and without restoration, though his debts were all discharged.

On the 5th of February, 1864, *Gilbert* commenced an action in the Court of Session against his father and his brother, to have his rights under the deed of the 12th of September, 1855, established, and to have the deed of the 11th of January, 1858, set aside.

On the 19th of February, 1864, the brother died, and the action was thereupon transferred against his executors and trustees.

On the 18th of April, 1864, *Gilbert* commenced a second action, which was directed against the executors and trustees of his brother, and also against his father, to have it found that *Gilbert* was now "the sole partner (1) in the firm, and entitled to the management of the business for behoof of himself and the representatives of *Charles*."

(1) *Quære*,—Can there be a *sole* partner?

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On the 15th of July, 1865, *Hugh* the father died, and on the 12th of November, 1864, his trustees and executors were substituted in his place as Defenders.

The grounds of *Gilbert's* proceedings were, shortly, that when established as a solicitor in *Glasgow*, he had been induced by his father to give up the legal profession and become a clerk in the brewery; that his services had been of great value to the concern; that when displaced he was under pecuniary pressure and without legal advice; and that advantage had been taken of him by those who had offered their assistance, and betrayed the confidence which he had reposed in them.

He further averred that the deed of 1858 was meant to operate only until his debts were paid, the real object having been to save the firm from exposure by his creditors. And he insisted that £35,000 was no adequate recompense for the sacrifice imposed upon him.

The answer of the Defenders was substantially a denial of *Gilbert's* allegations. He was not likely, they said, to have been deluded into the deed of 1858, for he was then a man of forty, with ten years' experience as a legal practitioner. The consideration upon which he had acted was sufficient to place him on a footing with the other children of *Hugh Tennent*, who had each of them a provision of £35,000.

The Defenders, moreover, relied upon the Scotch statute of 1696, c. 25, which, according to their contention, had the effect of precluding the Pursuer from resting on verbal assurances that the deed of 1858 was to have only a limited effect.

The Court of Session, after a great body of evidence had been adduced on both sides, pronounced judgment against *Gilbert* on the 22nd of May, 1868, "repelling the reasons of reduction, and sustaining the defences," with costs.

Against this judgment *Gilbert* appealed to the House, having for his counsel Sir *Richard Baggallay*, Q.C., Mr. *Dickinson*, Q.C., Mr. *Macnaughten*, and Mr. *A. B. Shand*.

The Respondents were represented by The *Lord Advocate of Scotland* (1), Sir *Roundell Palmer*, Q.C., Mr. *Mellish*, Q.C., Mr. *Wickens*, and Mr. *Lorimer*.

(1) Mr. *Young*.

At the close of the argument, which turned entirely on an investigation of facts, the following opinions were delivered by the Law Peers.

THE LORD CHANCELLOR (1), after a careful examination of the evidence, expressed a clear opinion that in the agreement of 1858 there was nothing unjust or unreasonable, nor was there any proof of undue pressure, regard being had to the mature age of the Appellant, and his professional experience. His Lordship closed as follows:

I come, my Lords, to the conclusion, in this very painful case, that Mr. *Gilbert Tennent* has been wrong throughout in his contention, and that the decree complained of must be affirmed with costs.

LORD CHELMSFORD:—

It seems to me that there is no ground for the reduction of the deed of 1858; and I am of opinion that the decision appealed from ought to be affirmed.

LORD WESTBURY:—

My Lords, if I had found anything to warrant the inference that the deed of 1858 was framed with the view only of being a shield to the father and the brother against the creditors of the Appellant, I should not be deterred by the Scotch statute of 1696 from concluding that it was competent to the Court on the evidence before it to declare that the deed was not a reality—that it had now ceased to be operative—and that the Appellant should be remitted to his former position.

But the transaction having been clearly a real one, it is impugned by the Appellant on the ground that he parted with valuable property for a most inadequate consideration. My Lords, it is true that there is an equity which may be founded upon gross inadequacy of consideration. But it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition. It is impossible to say that the inadequacy of consideration in this case amounts to anything like proof to warrant either of those conclusions.

(1) Lord *Hatherley*.

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The situation of the Appellant, therefore, with regard to this business was an extremely precarious one. Though the father had given, the father had the power to take away.

We are undoubtedly struck very much with the small amount of the Appellant's debts which threw the father into so great a terror. But we should carry back our recollection to what the feelings of men were at that particular period of commercial disaster.

The father originally contemplated the restoration of his son, but he felt it necessary that he should have an uncontrolled discretionary power. Now, can we sit in judgment and say that the father was not warranted in the conclusion at which he arrived? Certainly not.

Then, was that conclusion carried out in a way of which the son has a right now to complain? If I found it carried out with one speck of imposition on the son, if anything was told or represented to him which ought not to have been told or represented, if anything was withheld from him which ought not to have been concealed, if he was placed in the hands of an adviser who leant more to the father and to the brother than to him, I should have thought that this family agreement, with respect to which it is required that there should be on all sides *uberrima fides*, ought not to have been upheld. But I find nothing of the kind; nor does the Appellant complain of anything of the kind.

You have, my Lords, but one inquiry to make—was this discretionary power placed by the Appellant in the hands of his father without undue constraint? These are questions which are to be answered out of the account which the Appellant himself gives of the transaction. He says that there was but one point of difference—shall there be an absolute power of restoration to myself, or shall it be left to the discretion of my father? He tried long and earnestly to prevail on his father to consent to an absolute power. The father was resolute also; and the Appellant submitting, clothed his father with that discretionary power of restoration.

If that be so, there is nothing whatever that, in a Court of justice, can be complained of by the Appellant; unless, indeed, we find that fraudulent and unjust influences were used with regard to the father by the brother *Charles* to induce him not to exercise

this power; or unless we find that the power really was substantially afterwards exercised by the father in favour of the Appellant.

I am myself unable to find anything that would fix on the brother *Charles* any iniquitous dealing so as to poison the mind of the father and prevent him from exercising that power.

But then we are told that he was substantially restored, and that the power, therefore, was in reality exercised, although not in form. Upon the examination of that matter I find no warrant whatever for any such conclusion.

On all these grounds, therefore, although I could have wished that a very different conclusion could have been arrived at, particularly when I see that it took only five short years from the date of this agreement to enable the brother to pay off to the father the whole of that debt of £214,000, and to realize for his own benefit sums amounting to very near £300,000; although I could have wished that natural affection had suggested a different course of action; yet that matter is not within our province, and we are not called on to express any opinion upon it. I am most unwillingly compelled to agree that, consistently with our established rules, this appeal must be dismissed, and dismissed with costs.

LORD COLONSAY:—

I may state that in this case I do not see any facts that bring it within the rule or operation of the statute of 1696 with regard to trusts; and on the whole, my Lords, cannot do otherwise than concur in the course suggested by my noble and learned friend on the woolsack.

Decree affirmed, and appeal dismissed with costs (1).

Solicitors for the Appellants: *Uptons, Johnson, & Upton.*
Solicitors for the Respondents: *Grahames & Wardlaw.*

(1) The case is fully reported in the 3rd Series, vol. vi. p. 840; and in the *Scottish Jurist*, vol. xl. p. 408.

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April 29.

LORD CHARLES HAMILTON . . . . . APPELLANT;
THE DUKE OF HAMILTON . . . . . RESPONDENT.

Defective Entail—Consequent Liberty under Lord Rutherford's Act (11 & 12 *Vict. c.* 36), *s.* 43.

Where the irritant and resolutive clauses do not fence the prohibition against altering the order of succession, the entail is ineffectual; even in a question *inter hæredes.*

THE Duke of *Hamilton* instituted the suit in this case to have a declaration from the Court of Session that the entail of the family estates was invalid, and that he had full power to sell and dispose of them at his pleasure. All the heirs, subsequent to himself, were called as parties; the first on the list being the above Appellant.

The objection on which the Duke relied was that the prohibition in the entail against altering the order of succession was not adequately fenced by the irritant and resolutive clauses; and therefore, that, under the *Rutherford Act*, his Grace was entitled to deal with the property precisely as if it were held by him in fee simple.

The Lord Ordinary (1) ruled that the irritant and resolutive clauses, framed as they were on the principle of enumerative recital, did not apply to the prohibition against altering the order of succession. The entail, therefore, was defective as to a provision which the law deems cardinal—and the decisions rendered it imperative to pronounce judgment in favour of the Duke—having regard especially to *Dempster* v. *Dempster* (2), in which the House of Lords determined that an entail bad in any one of its prohibitions was bad in all; the policy of the law, under the statute, being hostile to entails.

Lord *Archibald Hamilton* presented a reclaiming note to the First Division of the Court of Session, whose decision was thus concisely expressed by Lord President *Inglis* on the 20th of November, 1868:—

We entertain no doubt that the Lord Ordinary is right in holding that the prohibition against altering the order of succession is not fenced by irritant and

(1) Lord *Barcaple.* (2) 3 Macq. 62.

resolutive clauses. We are also of opinion that he is right in holding that the effect of the 43rd section of the *Rutherford Entail Amendment Act* in such circumstances is to make this entail bad to all intents and purposes.

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In support of the appeal to the House,

The *Dean of Faculty* (1) and Mr. *Mellish*, Q.C., appeared.

Sir *Roundell Palmer*, Q.C., and Mr. *Anderson*, Q.C., were heard for the Respondent.

LORD CHELMSFORD, LORD WESTBURY, and LORD COLONSAY were unanimous in holding that the judgment complained of was right; and that it should be affirmed with costs; the question having been rendered, as Sir *Roundell Palmer* observed, clear and simple by a series of uniform decisions (2).

Solicitors for the Appellants: *Connell & Hope.*

Solicitors for the Respondents: *Gregory, Rowcliffe, Rowcliffe, & Rawle.*

MRS. HAY NEWTON OR FERGUSSON *et al.* APPELLANTS; W. D. O. HAY NEWTON OF NEWTON . . . RESPONDENT.

1870 *May* 9.

Death-bed Deed—Affecting Heritage—Reducible.

To protect sick persons from importunity, and to save their heirs from mischief, the law of *Scotland* declares that if a deed affecting heritage be executed on death-bed, it may be set aside *ex capite lecti.*

Exception when the Deed is in execution of a Faculty.

The rule, however, does not apply when the deed is made in execution of a faculty or power.

Provision for Widow and younger Children.

Circumstances under which provisions for a widow and for younger children were set aside by the heir in possession under an entail.

ON the 13th of December, 1860, the late Mr. *Hay Newton*, of *Newton*, in the county of *Haddington*, granted to his wife Mrs. *New-*

(1) Mr. *Gordon*, Q.C.

(2) The case is reported, and the clauses set out in the 3rd Series, vol. vii., p. 139.

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ton, since become Mrs. *Fergusson*, a life-rent annuity of £500, under *Lord Aberdeen's Act* (1).

Three years afterwards, on the 31st of October, 1863, he granted to his said wife a life-rent interest by way of locality.

On the same day (the 31st of October, 1863), he also granted a bond binding the heirs of entail to make good a provision for his younger children as specified in the deed.

Mr. *Newton* died on the 19th of November, 1863, and was succeeded by his son, the above Respondent, who forthwith challenged the deed of the 13th of December, 1860, on the ground that it had been superseded.

The Respondent likewise challenged the two deeds of the 31st October, 1863, on the ground that they had both been executed upon *death-bed*, and consequently, by the Scotch Law, were reducible.

The Lord Ordinary reduced and set aside the three instruments thus challenged, and upon the case coming before the First Division on the 18th of July, 1867, the opinion of the Court was delivered by Lord *Curriehill* with extraordinary research and ability, the other Judges simply concurring in a unanimous adherence to the Lord Ordinary's interlocutor (2).

The decision in effect was, that the deed of the 13th of December, 1860, had been intentionally evacuated by the grantor's subsequent execution of a new entail; that the deed of locality in favour of Mrs. *Fergusson* was subject to the Scotch Law of *death-bed*, having been executed, not by virtue of a faculty or power, as the Appellants contended, but—in the exercise of ordinary ownership; the instrument, moreover, deriving no efficacy from the allegation that it was in lieu of terce, seeing that terce was absolutely excluded by the investiture; and finally, as regarded the provision for the younger children, that it was also, like the provision for locality, reducible *ex capite lecti*.

Against this adjudication Mrs. *Fergusson* and the younger children of Mr. *Newton*, namely, Captain *Hay* and his two sisters, appealed

(1) 5 Geo. 4, c. 87, authorizing provisions for the widows and children of the proprietors of entailed estates in *Scotland*.

(2) See the report of the decision in the Court of Session, giving in full the opinions of Lord *Curriehill* and Lord *Barcaple*; 3rd Series, vol. v. p. 1058, and *Scottish Jurist*, vol. xxxix., p. 594.

to the House, having for their counsel Sir *Roundell Palmer*, Q.C., and Mr. *Anderson*, Q.C.

The *Lord Advocate* (1) and the *Dean of Faculty* (2) were for the Respondent.

The following opinions were delivered by the Law Peers :—

THE LORD CHANCELLOR (3) :—

I concur entirely with the judgment which has been pronounced by Lord *Curriehill* (4). With reference to the deed of 1860, framed under the *Aberdeen Act*, he observes that it would have been effectual if the grantor had continued to hold the estate exclusively on the title upon which it was possessed by him at the date of the instrument, and if, moreover, he had never revoked it. But being merely a *mortis causâ* provision, the grantor could render it ineffectual, and in my opinion he did so.

The next question is as to the deed of locality, and the deed making provision for the children. Can they be maintained although executed on death-bed ?

The learned Judges have pronounced their opinion, which seems founded on accurate reasoning, proceeding upon grounds analogous to those upon which the English Courts have occasionally acted, namely, the distinction between power and property. The fiar of an estate has all the rights incident to complete ownership, except so far as they are fettered and restricted. Accordingly, if you say (and our law allowed such a provision) I hand over this estate to such a person with ample authority to do such and such acts, but with restriction against the doing of other acts, all that you leave him the power to execute is that part of the ownership which you have not restricted. If you give him an estate for life, and give him besides the power of burdening the inheritance with charges for his wife and children, you have then created a life interest, and you have superadded to the life interest a power; but if you give him the entire interest, as is done by the instrument of tailzie in the present case, restricted only in certain particulars, then in every particular in which you have not restricted

(1) Mr. *Young*, Q.C.
(2) Mr. *Gordon*, Q.C.
(3) Lord *Hatherley*.
(4) See note (2), *ante*, p. 14.

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it the entire interest remains. This gentleman, Mr. *Newton*, in whatever capacity you look upon him, is not taking a power superadded to any limited interest which exists, but is taking a large and disposing interest over the whole property, limited only in certain respects, and in every other respect where not so limited, existing as the full power and authority which every landowner has the right to exercise.

Now in that state of things the heir has a right to complain of what has been here done.

The case of *Pringle* v. *Pringle* (1) is a very clear case, and there is only one case, that of *Forbes* v. *Forbes* (2), which for a moment created any doubt or difficulty in my mind on this point.

But I apprehend that there cannot be any doubt that in this particular case the provision made by Mr. *Hay Newton* has been made out of the full and complete ownership which, as it appears, he possessed, and has not been made by virtue of any faculty, and is therefore to the prejudice of the heir, and being to the prejudice of the heir it must fail to prevail either as regards the provision for the children or the provision for the widow.

Holding the bond to have been revocable and revoked, of course it could have had no influence to support the deed of locality.

But then a question has arisen which required a little more looking into, namely, with regard to the lady's right of terce. I think that with regard to all the lands, excepting two small properties called *Long Newton* and *Kidlaw*, the whole estate was held upon instruments which completely excluded the lady from terce. With reference, however, to these small properties, they are in a somewhat peculiar position. There was a moment undoubtedly in which they existed in the husband, Mr. *Hay Newton*, unentailed; and it is upon that instant of time that the lady places her hand, and says, "Then and there my right of terce arose, and nothing could subsequently be done to affect that right." But when the disentailing took place with reference to these "small properties," it was with an express obligation on the part of Mr. *Hay Newton* that they should be re-entailed.

This appears very clearly; and upon the whole, my Lords, unless you should be inclined to think that in a family suit the ordinary

(1) Morr. 3287; 2 Paton, 130. (2) Morr. 3277; 2 Paton, 8.

rule as to costs should be mitigated, the only alternative must be the dismissal of this appeal with costs.

LORD CHELMSFORD concurred.

LORD WESTBURY:—

I regret very much that this appeal has been presented, because the whole case was, to my mind, disposed of in a most satisfactory manner by the comprehensive judgment of Lord *Curriehill.*

The principal argument of the Appellants is founded entirely upon a misconception of the word "faculty," and of the rule of law which says, that a deed granted in exercise of a faculty shall not be reducible *ex capite lecti.* The word "faculty," in the enunciation of that rule, means a power of disposition held by one man over the estate of another. In that case the deed is not reducible, and for this reason, that the power of reduction is limited in the Scotch law to the heir of the grantor of the instrument; but when the heir of the grantor is in no respect prejudiced or damnified by the instrument, there is no such power of reduction. Now, the heir of the donee of a pure faculty, that is, of a power of one man to dispose of or charge the estate of another, cannot be damnified by the exercise of that power. Therefore the law has left that case of exemption to the ordinary rule of death-bed.

Now here the Appellants call this a power or faculty to grant a deed of locality. It is neither a faculty nor a power. The deed of locality, if validly granted, is granted by virtue of the right of ownership. It emanates from the fee simple of the party, and not from any express power or faculty to charge the estate belonging to another person. It is happily expressed by the Lord Ordinary—that what is called power to grant deeds of locality is nothing more than a relaxation of the fetters, or rather, a declaration that the fetters shall not apply to that case, which leaves the gentleman who is called the donee of the power absolute fiar unfettered, so that he, in respect of the ownership, has that right which an absolute fiar has, namely, to grant deeds of locality.

This has been made so clear in other decisions, that I regret

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very much there should have been such misapprehension as to lead to this expensive appeal.

But then the Appellants say that the heir-at-law has accepted the estate under the deed, reserving what he still calls a power. The heir-at-law accepted the estate on the terms of the entail, which were these, that the fiar, the maker of the entail, or the tenant in tail, might grant deeds of locality, but then he must grant them in conformity with the rule of law; and therefore he must grant them subject to reduction *ex capite lecti*. That is nothing more than a mode of putting the same argument again upon the ground of "faculty."

The Appellants next complain that no attention was paid to their argument in the Court below, which they repeat here in these words:—

> Even in the case of one who is substantially fiar and owner of the estate, such reserved powers may be validly exercised on death-bed in a question with any one who is claiming and taking benefit under the deed which contains the power.

The answer to that argument is just what has been already stated. The deed contains no power; and if you call this a condition of ownership, it is a condition that must be complied with in conformity with the rule of law. There is no exception unless you can make out that it is a faculty granted to one man to charge the estate of another.

The Appellants further contended that *Forbes* v. *Forbes* (1), and *Pringle* v. *Pringle* (2), were in their favour. I will say a word upon those cases, because they have been much misapprehended. The case of *Forbes* v. *Forbes* (1) was a case of ante-nuptial marriage contract, which, being for valuable consideration, bound the heir. The heir tried to avoid it by going back to the earlier title, and getting investiture under it. But the House of Lords held that the marriage contract bound the estate, and bound the heir, and that the faculty to grant bonds of provision was a faculty given to a life-renter who had nothing more than a life-rent; and therefore the bond, if executed upon a power exercised by him taking effect on his death-bed, would be a power over the inheritance which was limited to another person. It was a pure faculty; and on that ground the House of Lords, setting up the contract as

(1) Morr. 3277; 2 Paton, 8. (2) Morr. 3287; 2 Paton, 130.

against the heir, set up also the faculty, and held that it was not reducible *ex capite lecti*.

Pringle v. *Pringle* (1) was a case of homologation. It depended, indeed, upon contract, but not upon contract for valuable consideration. The House of Lords held that it was a contract which the heir had assented to, had homologated and confirmed, and, therefore, that he could not avoid it by resorting to an investiture under an earlier title. And on the ground of the heir's homologation and confirmation the House arrived at the same conclusion as that which had been previously arrived at in *Forbes* v. *Forbes* (2). Neither of these cases, therefore, is applicable to the appeal now before us, unless you can displace the observation made by the Lord Ordinary and by Lord *Curriehill*, which is perfectly correct, that this which is here called a "faculty" is no faculty at all; that it is nothing more than a reservation of the ordinary *jus disponendi* incidental to ownership.

But it is said that here the widow is excluded from terce, and that, if excluded from terce, she gives up the terce as a consideration for the deed of locality. That, again, proceeds on a misapprehension of the whole case, because the widow's exclusion from terce is absolute and unconditional. It is not made to depend on her getting another provision; but whether what is called the power, the right to grant a deed of locality, was exercised or not, or whether a bond of provision was given or not, the widow would be equally excluded from terce.

Then comes the remaining fallacy, which is, that the deed of locality was given in place of the bond of provision. The answer, unfortunately (and I regret there should be such an answer), is that the bond of provision, which was dated in the year 1860, was superseded or evacuated—in effect, revoked and recalled—by the operation of the deed of entail of 1861. And the deed of locality was not attempted to be made until the year 1863. What, therefore, is attempted to be set up as the consideration for the deed of locality, or as something on which the widow may fall back if deprived of the deed of locality, turns out to have been evacuated entirely on different grounds, and therefore cannot be prayed in aid of the inefficient and ineffectual deed of locality.

(1) Morr. 3287; 2 Paton, 130. (2) Morr. 3277; 2 Paton, 8.

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Now, these things are so well explained in the very excellent judgment given by Lord *Curriehill*, that I should have thought that judgment would have been satisfactory to every Scotch lawyer. I regret this appeal, and I am sorry that this is the case of a widow, but I am glad to say a widow by no means destitute of a living. On the contrary, I believe she is well provided for. And as to costs, we must abide by the ordinary rule.

LORD COLONSAY:—

My Lords, I have really nothing to add to the observations which have just been made by my noble and learned friend. I think the flaw in the whole case of the Appellants is their assuming this to be a faculty, which it is not.

Interlocutors affirmed, and appeals dismissed with costs.

Solicitors for the Appellants: *Loch & Maclaurin.*
Solicitor for the Respondents: *W. Robertson.*

1870
May 9.

DUNCAN . . . . . APPELLANT;

THE SCOTTISH NORTH-EASTERN RAILWAY COMPANY . . . . . } RESPONDENTS.

Local Acts exempting Railways from Poor-rates, abrogated by General Enactment.

Declaration by the House (reversing the decree below) that the provisions in the local Acts of 1836, exempting the *Dundee and Arbroath* and the *Arbroath and Forfar Railways* from poor-rates, were, in effect, abrogated by the *General Poor Law Amendment Act*, 1845, and by the *General Valuation of Lands Act*, 1854.

By the *Poor Law Amendment Act* of 1845 an entire railway is treated as a heritage to be valued *in cumulo*, and is, for the first time, made a distinct subject of taxation.

By the *Valuation of Lands Act* of 1854, the *cumulo* yearly rent of the lands held by railways in *Scotland* is first to be ascertained; and 3 per cent. for the cost of stations, wharves, &c., being deducted, the proportion of each parish becomes demandable from the respective companies.

In the *Edinburgh and Glasgow Railway Company* v. *Adamson* (1), the remarks of the Lord President (now Lord *Colonsay*) concurred in.

IN this case, upon a Note of suspension and interdict presented by the Respondents against the Appellant as collector of poor-rates for the parish of *St. Vigean's* in the county of *Forfar*, the Lord Ordinary allowed the reasons of suspension, and granted the interdict sought; and the Second Division, upon a reclaiming note, determined that the Respondents "were not liable for poor-rates, whether as owners or occupants, in respect of any portion of their railway constructed wholly upon ground acquired by them in the manner specified in the statutes authorizing the exemptions thereby conferred."

Upon the appeal to the House, the case of the Appellant was argued by Sir *Roundell Palmer*, Q.C., and Mr. *Anderson*, Q.C.

The *Lord Advocate* (2) and Mr. *Mellish*, Q.C., were heard for the Respondents.

The following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (3):—

By the 3rd section of the *Dundee and Arbroath Railway Act* the company was authorized to make the railway. By the 21st section the form of conveyance was specified; and by the 23rd section it was enacted that

> The rights and titles to be granted to the said company shall not in any measure affect or diminish the right of the superiority of the same; which shall remain, as before, entire in the persons granting such conveyances, and the lands and heritages conveyed to the said company shall not be liable for any feu duties or casualties to the superiors, nor for land tax, cess, stipend, schoolmaster's salary, nor any public or parish burden whatever, but the same shall be paid by the original proprietor of such lands or heritages.

This form of enactment appears to have been not infrequent at the time, owing to a jealousy felt by the proprietors of lands with reference to the influence conferred by superiorities, which conferred votes for the election of members of Parliament. There was no intention of liberating the lands altogether from the pay-

(1) 15 Dunlop, 537.
(2) Mr. *Young*, Q.C.
(3) Lord *Hatherley*.

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ment of the rates. That is expressly asserted in the latter part of the clause, which says that the rates shall be paid by the original proprietors.

The Act (1) for taking the land from *Arbroath* to *Forfar* differed in some degree from the *Dundee and Arbroath Act* (2). The *Arbroath and Forfar Act* declared that the public and parochial burdens

> Should be paid by the original proprietors, except in case the company should purchase the whole lands belonging to any person within the said parishes, in which case the said burdens should be paid by the said company for the whole of such lands or heritages.

But subsequently to these Acts very great changes took place with reference to the whole arrangement of the poor law assessment as regarded railways. In the year 1845 an Act was passed which entirely varied the position of railway companies with reference to the mode in which they were to be assessed for the relief of the poor in *Scotland*. It enacts in the 1st section that the word "heritage" shall extend to railways; and in sect. 36 there is a provision that

> Where the one-half of any assessment is imposed on the owners, and the other half on the tenants or occupants, it shall be lawful for the parochial board, with the concurrence of the Board of Supervision, to determine and direct that the lands and heritages may be distinguished into two or more separate classes.

There being distinct power given of assessing one-half upon the owner and the other half upon the occupier. In sect. 43 it is enacted that

> Where the one-half of any assessment is imposed on the owners and the other half upon the tenants or occupants, it shall be competent for the collector to levy the whole upon the tenants or occupants, who shall be entitled to recover one-half thereof from the owners.

In sect. 45 it is enacted—

> That in cases where any railway shall pass through or be situate in more than one parish or combination, the proportion of the annual value thereof on which such assessment shall be made for each such parish or combination shall be according to the number of miles or distance which such railway passes through or is situate in each parish or combination in proportion to the whole length.

Thus the assessment in each parish upon land held by a railway company is wholly irrespective of any improvement made by the railway company in that particular parish.

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(1) Passed in 1836. (2) Also of 1836.

I cannot do better than refer to what was said by the Lord President (1) so far back as March, 1853, when he laid it down that

> The *Poor Law Act* prescribes a mode of assessing railways different from that prescribed as to any other kind of lands and heritages. It deals with railways as a whole, and apportions the annual value according to the number of miles in each parish, not according to the annual value of the land occupied in each, nor according to the proportion of traffic in each, nor according to the amount of expenditure upon construction in each, nor according to the profit on the amount received as compared with the expense of working in each. The actual value, positive or relative, of the part of the railway situated within each parish is excluded from the inquiry.

There is an attempt in the *Valuation of Lands Act* of 1854 to administer something more like a principle of rateable value with reference to the property in the parish itself, than that which existed under the former Act. In assessing the whole value of the railway, as a property to be let, and to have a given value assigned to it, the Act of 1854 directs that there shall be a deduction of 3 per cent. from that value in respect of depôts, and other buildings of an important character, which may be occupied by the railway.

I apprehend, my Lords, that the decision come to by the Court below is erroneous, inasmuch as it has exempted the railway company from a contribution towards the rates in the parish of *St. Vigeans*. What we probably ought to do would be to reverse the interlocutor which is appealed from; and it may possibly be thought right by your Lordships to give some reasons in the shape of findings with reference to the grounds upon which we proceed in so doing.

LORD CHELMSFORD:—

I entertain no doubt that if there were nothing more to be considered than the Acts of 1836 the railway company would be exempt from all liability to this assessment. But in 1845 the Act of 8 & 9 Vict. c. 83, was passed. Whether, after that Act, the original proprietors of the land acquired for the purposes of the railways continued liable to assessment or not, it is unneces-

(1) Now Lord *Colonsay*, in the *Edinburgh and Glasgow Railway Company* v. *Adamson*, 15 Dunlop, 537; see also 2 Macq. 331.

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sary to determine. It is sufficient for the decision of this appeal to say that, so far as the railway companies are concerned, the exemption clauses must have been deprived of all effect by the passing of the Act of 1845, because they had no longer any subject upon which to operate.

I think, therefore, that the interlocutor appealed from ought to be reversed.

LORD WESTBURY:—

It has been contended on the part of the Respondents that the two Acts of 1836, under which these small railways were constructed, contained a parliamentary exemption from the poor-rate. And it has been further contended that this exemption was not taken away by anything contained in the *Poor Law Amendment Act* of 1845, or in the *Lands Valuation Act* subsequently passed. It may, therefore, be material in the first place, to ascertain what, under the two Acts of 1836, was the true status of these railways with reference to taxation for the relief of the poor. This depends on the construction of the 32nd section of the one Act, and the 23rd section of the other. The effect of these sections appears to me to have been, that where the railway company should take from a proprietor such pieces or slices of land only as were required for making the railway, they should take them *free* from parochial burdens, which were to remain charged on the owners of the residue of the lands, the parochial assessment not being disturbed; but that where, instead of pieces out of lands, the whole lands should be taken, then the railway company should be liable to the burdens in like manner as any ordinary vendee.

I do not concur with the Appellant, who contends that the pieces of land were taken by the company charged with all public and parochial burdens. The true construction appears to be, that for the purpose of parochial taxation the railway is not to be regarded as proprietor or occupier; but the ownership and occupancy of the lands sold to the railway company are regarded as still remaining in the adjoining proprietors. If, therefore, the assessment for the relief of the poor were still governed by the rules that subsisted at the time of the passing of the Acts of 1836, I should have been of opinion that the railway company was not

liable to be assessed in respect of the lands held by them in the parish of *St. Vigeans*. But this relation of the railway company to the adjoining proprietors, and the exemption of the railway itself from taxation and assessment, are entirely altered and superseded by the subsequent legislation.

By the *Poor Law Act* of 1845, and by the subsequent Valuation Acts, there is created a new subject of taxation, and a new mode of valuation or assessment. From and after these statutes the tax assumes an entirely different character. By the *Poor Law Amendment Act* of 1845 an entire railway is treated as a heritage to be valued *in cumulo*, and is, for the first time, made a distinct subject of taxation. In the remarks of my noble and learned friend (1), which the Lord Chancellor has read, and which, therefore, I abstain from reading again, I entirely agree. This rule of a mileage assessment was affirmed by this House in 1855 (2). The rule given by this Poor Law Act is wholly inconsistent with the exemption alleged to be contained in the Acts of 1836.

This mode of assessment, however, has been superseded by a different system under the *Valuation of Lands Act* of 1854 (3). In that Act the directions for ascertaining the subject of taxation and its value are very precise and peremptory. The *cumulo* yearly value or rent of the whole lands and heritages in *Scotland* held by any railway was by that Act first to be ascertained, and from the amount 3 per cent. of the whole cost of the stations, wharves, &c., was to be deducted; and the proportion of such diminished *cumulo* rent or value, corresponding to the lineal measurement of the portion of the line situate in each parish, as compared with the lineal measurement of the entire line, with the addition of 3 per cent. on the entire cost of any station, &c., of the railway within the parish, is to be deemed and taken to be the yearly rent or value of the lands and heritages in such parish belonging to or held by the railway company.

No doubt some injustice has been done to the railway company; but it is probably due to the neglect of the company in not bringing their particular exemption under the Acts of 1836 before Parliament when the *Poor Law Act* and the *Valuation Act* were

(1) Lord *Colonsay*. (2) 2 Macq. 331.
(3) 17 & 18 Vict. c. 91.

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being considered by it; and in consequence of their not having done so, they have entirely lost the benefit of the exemption given them, which is in effect abrogated by the subsequent statutes. I think, therefore, that the interlocutor of the Inner House of the 12th of December, 1867, which is the only interlocutor appealed from, is erroneous and must be reversed.

The whole subject of the note of suspension, which was brought in the Court of Session, will thus be disposed of.

LORD COLONSAY:—

In conformity with the opinion which has now been expressed, I think there should be some declaration or finding by this House as to what is the true position and relative liabilities of the parties.

I confess that I have difficulty in concurring in the grounds upon which the judgment is pronounced. I think that the interpretation of this clause in the local Act which has been given by my noble and learned friends is a sound one. I think, with them, that it is a clause of exemption, not a clause of relief. The liability is declared to rest upon the land. I also agree with them that parochial burdens include poor-rates; and that sect. 91 of the *Poor Law Act* did not either extinguish the right, or convert into a right of relief. The question, then, comes to be whether, by subsequent Acts of Parliament, the position of the parties is so altered, that either the railway is to bear the whole burden, or the landowner is still to bear it. There has been a good deal of difficulty about that, and the state of the legislation upon the subject is exceedingly unsatisfactory. I may say that I do not, in that view of the matter, regret the result at which my noble and learned friends have arrived with respect to the interpretation of these Acts, because I think it will put the matter upon a simple and clear footing without further legislation.

I think that the new mode of assessment prescribed for railways is applicable to the railway as a whole. I do not in the least depart from the opinion which I expressed in the case of *Edinburgh and Glasgow Railway* v. *Adamson* (1), which my noble and learned friends have concurred in, as to what is the meaning of the word

(1) 15 Dunlop, 537.

"railway," and what it comprehends. But the question in that case was, whether certain subjects in a particular parish were to be exempted from the valuation of the railway. I thought that the railway comprehended not merely the rails and the particular lands upon which the rails were laid, but the entire machinery and undertaking called the railway, and that the whole required to be valued. But I am not satisfied that there is in all cases an inconsistency between the enactment for valuing railways and an exemption such as these parties claim under this statute. If, for instance, a railway was made wholly within one parish, not going into any other parish, and wholly upon land acquired from any one person, it would be exempted; and in that case I apprehend that the word "railway" in the one Act would be equivalent to the word "railway" in the other, and that the liability would rest upon the landowner. In other cases there might be very great difficulty. The question is, whether a rule which is not universally applicable, but only partially applicable, is to be held as overturning the state of law which existed before, or whether it is only to be held as creating a difficulty in the application of it.

But in this particular case it appears to me that the railway company who claim an exemption from liability have so mixed up their acquisitions of land which were exempt in their hands, with lands which were not exempt, they have so complicated the matter that it is impossible or unfair to put upon a parochial board the duty of going into such an inquiry as would here be necessary in regard to the particular parcels, which seem to be almost infinite in number, and which are placed in different positions with reference to the tenure by which they are held. I think, therefore, that the railway company are not in a position to plead a suspension of the charge. At the same time I do not see very well how the matter is to work out in the end. The railway is to be liable to the assessment. Well, is the landowner to be liable as he was before the Act of 1845? Is he to bear a certain proportion of the assessment for land which is not in his possession? Can that legislation have altered a clause which was a clause of total exemption, imposing a burthen upon another person, into a clause of relief of some kind? Is the railway company now to have relief against the landowner for something; and, if so, for what? I see great

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difficulty in all that; but in this case I concur in the judgment reversing. I think that in the state of things into which the railway company have brought the matter, they are not in a position in which they are entitled to maintain the exemption. I shall give what aid I can in framing the declaration of the House.

The following special judgment was delivered by the House:—

The Lords Spiritual and Temporal, in Parliament assembled, find, That the provisions relating to the payment of poor-rates in respect of lands taken by the *Dundee and Arbroath*, and *Arbroath and Forfar* Railway Companies, which are contained in the local Acts, 1836, and founded on by the Respondents, were in effect abrogated by the provisions contained in the *Poor Law Amendment Act*, 1845, and the *Valuation of Lands Act*, 1854, relative to the assessment of railways: And it is therefore *Ordered* and *Adjudged*, That the Interlocutor of the Second Division, of the 12th of December, 1867, complained of in the said appeal, be, and the same is hereby reversed. And it is further *Ordered*, That the said cause be, and is hereby remitted back to the Court of Session in *Scotland*, with instructions to that Court to recal the interdict, to repel the reasons of suspension, and to deal with the matter of expenses in the said Court of Session as to the said Court shall seem just, and be consistent with this judgment.

Solicitor for the Appellant: *William Robertson.*
Solicitors for the Respondents: *Grahames & Wardlaw.*

WATERHOUSE . . . . . APPELLANT; 1870
JAMIESON . . . . . RESPONDENT (1). May 20.

Companies Act, 1862—*Shareholder's Liability.*

A Scotch company, whose *nominal* capital was £105,000, announced that £100,000 had been paid up, and that only £5000 could be called for. Relying upon this representation a gentleman, resident in *London*, purchased, as a transferee, 300 shares; and paid his proportion of the outstanding £5000 to the company. The liquidator alleged that this gentleman "knew, or *ought* to have known," that the company was a bubble; and proposed to make a call upon him of £30 for each of his shares:

The House (reversing the decree below), *held* that the liquidator was wrong; the shareholder having done all that could legitimately be demanded of him under his contract.

It is not incumbent on a shareholder to suspect fraud or institute inquiries where all seems fair and conformable to the requirements of the statutes.

The liability of a shareholder is to be measured by his contract, as based upon the statutory documents, which are registered for the purpose of protecting the shareholders on the one hand, and the creditors on the other.

The Court cannot expand the contract; nor will it fix upon a party any engagement larger or other than that into which he has entered.

There is nothing to warrant a contrary doctrine in *Overend & Gurney* (2), where the shareholder's contract was enforced; but in no respect altered; the contract, as it existed at the time of the winding-up, being the sole measure of liability.

The Court of Session having ruled, in effect, that a shareholder could not stand upon his contract, but was bound beyond it, at the suit of the liquidator —their decision was reversed.

Position and Power of a Liquidator.

Per LORD CHELMSFORD:—The liquidator appears to be merely substituted for the company.

Per LORD WESTBURY:—The rights of creditors when enforced by a liquidator, must be enforced by him in right of the company; and he cannot recover that which the company itself could not have recovered.

Doubt expressed by THE LORD CHANCELLOR on this point.

THE *Garpel Hematite Company, Limited,* was incorporated by registration under the Joint Stock Companies Acts, 1856 and 1857; the memorandum of association representing the capital as £105,000, divided into 1000 shares of £105 each; £100,000 being actually paid up, and £5000 remaining for calls.

(1) Fully reported, with the opinions of the Judges, in 3rd Series of the Scotch Rep. vol. vi., p. 591, and in the *Scottish Jurist*, vol. xl. p. 306.

(2) Law Rep. 2 H. L. 325.

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The registered articles of association also stated that the £100,000 was paid up, and that only £5000 would be called for.

The Appellant acquired, as transferee, 300 shares altogether, and he received from the sellers the company's certificates to the effect that upon each share £100 had been paid up.

The several transfers were respectively registered by the company in the transfer book under the proper columns, one of which, under the printed heading "Amount paid on each Share," stated £100 as having been so paid. The same statement appeared in the books and documents of the company. The Appellant, from time to time, made various payments to the company in respect of calls, and on the 20th of June, 1861, he received a discharge in full under the hand of the company's secretary.

On the 2nd of December, 1864, the company was ordered by the Court of Session to be wound up under the *Companies Act*, 1862; and the above Respondent was appointed liquidator.

A Petition was subsequently presented by the liquidator, severely impeaching the originators of the company;—asserting that the £100,000 represented as actual capital had never been paid up;—praying that a list of contributories might be settled, including the Appellant as liable for 300 shares;—and also, that a call of £30 on each share might be made.

The Appellant resisted the application; contending that as he had performed his contract no further demand could be made upon him.

The Court of Session, after much deliberation and difference of opinion, decided that the liquidator was "entitled to a proof of his averments;" thereby recognising their relevancy.

Against this decision Mr. *Waterhouse* appealed to the House, having for his counsel, Mr. *Roxburgh*, Q.C, and Mr. *Fitzroy Kelly*.

Mr. *Pearson*, Q.C., and Mr. *S. Will*, were heard for the Respondent.

The Law Peers, having taken time to consider, delivered the following opinions:—

THE LORD CHANCELLOR (1):—

The liquidator, by his condescendence, undoubtedly sets out a

(1) Lord *Hatherley*.

case of the grossest possible fraud on the part of the originators of this company. The recital in the articles of association that £100,000 had been paid up, is alleged by the condescendence to be wholly false; for that in truth no money had been ever paid, except only some trifling sums with reference to a lease which the so-called company had taken of certain hematite mines which they professed to work. The persons who originally put forth the memorandum and articles of association, and invited others to subscribe, stated in both those documents that the capital being £105,000, £100,000 thereof had been actually paid up. There was power given in the usual way to the directors to make calls. They were to make calls, of course, only for the amount of the unpaid capital, namely £5000.

That being the state of affairs, the company was launched out to the world, and the public were invited, by the registration of this memorandum and these articles under the *Joint Stock Companies Registration Act*, of 1856, to engage in the adventure. Mr. *Waterhouse* did so.

The course taken by the Court below, having regard to the importance of the case, was to appoint counsel to be heard before the whole Court, with a view to the Judges giving their opinions in writing on the following questions:—

First, whether the Petition of the official liquidator ought to be refused in so far as it prays that the list of contributories should be settled so as to include the name of the said *Alfred Waterhouse* as a contributory; or, secondly, whether the official liquidator ought to be allowed to establish by evidence the grounds on which he contends that the name of the said *Alfred Waterhouse* ought to be placed on the said list.

Now, my Lords, what the official liquidator affirms is this,—that the circumstance of the directors stating in the articles that £100,000 was paid, when it was not, in fact, paid, can make no difference as to the liability of the shareholders to creditors—the shareholders having held forth to the public that the capital of the company was £105,000—and that the creditors who now seek to be paid under the winding-up have a right to hold the shareholders to their engagement to make good the capital of £105,000. And further, as regards Mr. *Waterhouse*, who purchased his shares in the public market, the liquidator avers that he well knew, or

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might or ought to have known, the whole true state and circumstances of the case. The liquidator states :—

If Mr. *Waterhouse* had inquired, he would have discovered the true state of circumstances, from a simple inspection of the books of the company, which were extant shortly before the liquidation, and the fact that the £100,000 was not paid up was also known to all the officials of the company as well as to its members, and if Mr. *Waterhouse* had asked, as he ought to have done before becoming a shareholder, he would have learnt the true state of matters, and that the £100,000 was still unpaid.

A preliminary point was raised, namely, whether or not the official liquidator could institute proceedings of this character. It is said to the official liquidator: "You, as the representative of the company, are bound by the statements of the company; and you have no right to raise for the benefit of creditors, as against the company, this question that you attempt to raise." I apprehend, my Lords, that it is unnecessary to come to any precise determination upon that point here, but if the Joint Stock Companies Acts be thoroughly sifted, there will, no doubt, be considerable ground for coming to the conclusion when the proper time comes (I say no more about it now) that the official liquidator, who in that capacity is bound to collect all the assets of the company, and distribute them by the direction of the Court among the creditors, is in a position in which he may assert rights as against the company, and assume a position against the members of the company which the company itself possibly might not be in a position to assert.

The real and substantial point appears to be this: Whether or not a person taking shares in a company established under a deed which recites, however untruly, that £100,000 has been paid, and engaging, by his signature to that deed, to meet all the contributions which remain to be levied, but which are not to exceed £5 a share, the rest having been paid—whether, moreover, a person having purchased shares in the market on which the representation is that £100 has been paid up upon each share, and receiving certificates of those shares signed by the directors themselves, who were competent to act in the matter, and who gave such certificates, stating that £100 per share had been paid up, can afterwards, at the instance of creditors of the company, who discover that in truth no such payment has ever been made by the original

holders of the shares, but that in reality the shares had been taken and issued to the public without the fact being known that while they were £105 shares, only £5, or some very small amount, had been paid upon them, whether such a shareholder can be sued on behalf of the creditors of the company for the £100 per share which remains unpaid?

That question being raised between the creditors and the alleged shareholder, one has to consider what the exact position of such a shareholder is, and especially to consider how far, regard being had to the whole policy of these Acts of Parliament, a shareholder can set up the defence that he is not liable to the creditors beyond the amount which he has contracted to pay.

The Judges in the Court below differed considerably in opinion upon this point. I confess, after some considerable hesitation, I have come to the conclusion that a shareholder is entitled to say: The contract I have entered into must be found in the deed into which I have entered. For all purposes as between me and third persons, I am only to be held to have entered into those engagements which the deed itself represents me to have entered into; and as regards the shares which I have taken and purchased, having a document signed by those who are enabled to give such a certificate, certifying that a certain amount per share has been paid, which certificate is entered and duly registered as the Act requires, for the very purpose of protecting the shareholders on the one hand and the creditors on the other, I am entitled to say, no fraud being chargeable against me, that I am only liable upon that contract I have entered into. I am only liable to the extent of the money which appeared by the certificate itself, given me by the directors of the company, to be unpaid.

I think, my Lords, that the principles upon which your Lordships decided the *Overend & Gurney Case* (1), have really no bearing whatever upon the present question. Mr. *Oakes* had undoubtedly become a member of the company; he knew all the objects for which it was founded, and the terms of its constitution, and he entered into the ordinary engagements. Then he said: True it is I have entered into those engagements; but I seek to be relieved from them because I was induced to enter into them

(1) Law Rep. 2 H. L. 325.

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by misrepresentations, without which I should not have become a shareholder. But this House held that whatever rights he might have acquired against those who made the fraudulent representations, he had, as regarded the outer world, executed an instrument by which every creditor had a right to believe that he was bound, and that he could not extricate himself after the winding-up, although before the winding-up he might have instituted proceedings to liberate himself from the engagements into which he had been led by those misrepresentations.

But here the only engagement Mr. *Waterhouse* entered into was to pay up the £5 per share upon all the shares which he had taken. His case rests upon two grounds: First, that the deed itself so stated; and secondly, that his acquisition of the shares was in direct conformity with the representations of the deed, and that the shares were handed over to him accordingly. Although it is true (as some of the learned Judges observed) that there is nothing in the Act of Parliament which renders it a part of the duty of the directors to state in the memorandum of association what amount has been paid up, I do not conceive that that by itself can vary the position of this gentleman when he stands upon the contract he has entered into, and says: You cannot make a new contract for me.

There may be good ground for creditors taking such remedies as they may be advised on the ground of those representations which were made. And possibly (though it is not necessary for me now to express any opinion upon the subject) it may be competent for them to say: As to you, directors, I hold you to the amount which you said was paid up upon the shares.

The directors had a special duty imposed upon them by the Act of stating the amount paid up on the shares. They had a special duty to those who acquired and took up shares to state these facts truly. They performed those duties in a manner which had about it nothing to lead Mr. *Waterhouse* to suspect that they were being performed improperly. He saw on the register, on the one hand, the amount that would be recoverable from himself and the rest of the shareholders by calls, and, on the other hand, he was completely ignorant of any fraud in the transaction. In other words, the case comes to the simple point which arose in *Ex parte*

Currie (1), before Lord Justice *Turner*, and amounts to this simple proposition, that you cannot fix upon a person any engagement larger or other than that into which he has entered.

I had some hesitation with respect to this case in the first instance, but, on consideration, I have arrived at the conclusion that the Appellant must succeed, and that the interlocutor complained of, which allowed proof to be gone into upon those matters which, according to the view I have taken, should not be gone into, should be reversed, and that proper directions should be given for placing Mr. *Waterhouse* in a position in which he may no longer be molested, which will probably best be done by a direction to strike out that particular portion of the order made in the Court below which allowed the parties to go to proof.

LORD CHELMSFORD:—

It is clear that as between the Appellant and the company he had paid all that he was liable to pay, and if the company had continued to carry on its business no call could have been made upon him beyond the £5 he had paid on each of his 300 shares.

It is an essential preliminary to the formation of a company that there should be a memorandum of association, which may or may not be accompanied by articles of association prescribing regulations for carrying on the company. The *Joint Stock Companies Act*, 1856, requires the memorandum of association to state the amount of the nominal capital of the proposed company. The memorandum in the present case states the nominal capital of the company to be £105,000, "whereof" (it is stated) "£100,000 is paid up and £5000 remains to be paid."

The statement of the paid-up capital is alleged to be false, and not being required by the Act to be made, it is contended that it is of no avail against the liquidator upon the winding up of the company.

In the articles of association, which when entered into are required by the Act to contain regulations as to calls on the shareholders in respect of all moneys unpaid upon their shares,

It is agreed that the company may from time to time make such calls upon the

(1) 32 L. J. (Ch.) 57.

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shareholders in respect of the sum of £5000 now remaining unpaid on their shares as they think fit, provided such call shall not exceed at any one time 10*s.* per share.

Now, by the 10th section of the Act of 1856,

> The articles of association when registered shall bind the company and the shareholders therein to the same extent as if each shareholder had subscribed his name and affixed his seal thereto.

Under this agreement the company could not have made calls for more than £5 a share, agreed to be the only amount remaining unpaid.

I think this would have been the case as between the company and the original shareholders, though parties to the misrepresentation as to the paid-up capital, for they must be taken to have agreed that the assumed payment of the £100,000 was to be the basis of their contract. But the case of the Appellant, a transferee of shares, is much stronger than that of the original shareholders. He purchased his 300 shares partly from original shareholders, and partly from the company as forfeited shares, and he received certificates stating that he was the proprietor of these shares of £105 each, upon each of which £100 had been paid. The shares thus acquired by the Appellant were respectively registered by the company, and in the column headed "Amount paid on each Share" is inserted the sum of £100. The Appellant afterwards paid the amount of the calls made upon him to the extent of £5 on each share, and received a discharge in full, signed by the secretary of the company, on the 20th of June, 1861.

The Appellant had thus satisfied all his obligations before the 2nd of December, 1864, when the order for winding up the company under the provisions of the *Companies Act*, 1862, was made by the Court of Session.

It is contended on the part of the Respondent, that under this winding-up order the liability of the Appellant is entirely changed; that it is competent to the official liquidator, who it is said represents not only the company but also the creditors of the company, to shew that the company was founded on misrepresentation; that the allegation in the memorandum and articles of association that £100,000 had been paid was false; that the statement on the

register of £100 having been paid on the Appellant's shares was also false; and that the liquidator is, therefore, entitled to make calls upon the Appellant to the extent of £100, not actually, but only nominally paid on each of his shares.

Upon examining the *Companies Act*, 1862, I find nothing to warrant the assertion that the powers of the liquidator are as extensive and searching into the constitution of a company as is thus alleged. He is appointed for the purpose of assisting the Court in the winding up of a company, but in all his proceedings he appears to be merely substituted for the company.

The Appellant was no party to any misrepresentation, but purchased *bonâ fide* under the assurance that there remained only £5 to pay on the shares, and he must have regulated the price which he paid for them accordingly. If knowledge of the statement of the payment of £100 upon each of his shares being untrue would have altered his position, the liquidator does not pretend to be able to prove actual knowledge on the part of the Appellant, but merely alleges "that he knew, or ought to have known, that the nominal capital of the company was not paid up, and that the slightest inquiry would have disclosed it."

If before his purchase the Appellant had looked to the documents he would have found upon the memorandum and articles of association, and upon the register, the statutory proof that £100 had been paid upon each of the shares; and if (as he was entitled to do) he relied upon the representations of the company, he bought and accepted the transfer upon the footing that he would have no more to pay than £5 upon each of his shares, and he cannot, in my opinion, be made liable for a larger amount.

I think the interlocutor must be reversed.

LORD WESTBURY:—

I take it to be quite settled that the rights of creditors against the shareholders of a company when enforced by a liquidator must be enforced by him in right of the company. What is to be paid by the shareholders is to be recovered in that right. What is due to the company is that only which is in fact recoverable by

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v.
JAMIESON.

the company. The liquidator, therefore, standing in the place of the company, the question is, has he a right to impeach the memorandum, set aside the articles, reduce the certificate, and recover in right of the company that which the company could not for one moment, as against a *bonâ fide* shareholder, be entitled themselves to recover?

I entirely adopt, in few words, what fell from my noble and learned friend (1) in the case of *In re Duckworth* (2), where my noble and learned friend used these words: "The liquidator represents the creditors only, because he represents the company, and through the company the rights of the creditors are to be enforced." Now, here the Appellant is a *bonâ fide* holder of shares, upon which, no doubt, there was a false statement made by the company of which he had no knowledge, and as to which he was under no obligation to inquire, and therefore he cannot be subjected to liability by having imputed to him a knowledge of the falsehood. Could the company recover against him? If there had been no winding-up order the question would not have admitted of a moment's doubt, and the winding-up order does not place the liquidator in a better position against the shareholder than the company were in. I therefore entirely concur in the order which has been proposed by my noble and learned friend.

LORD COLONSAY:—

My Lords, I have come to the same conclusion to which my noble and learned friends have come. I am not surprised, however, that there was a difference of opinion upon this case in the Court below. I think some of the Judges there took an erroneous view of the decision of this House in the *Overend & Gurney Case* (3); but the distinction between the two cases has been clearly pointed out by my noble and learned friend on the woolsack. We have to deal here with the case of *Waterhouse* alone. I think the course to be followed is just that which my noble and learned friend on the woolsack has suggested, that we should reverse the interlocutor of the Court below, and pronounce that the Petition

(1) Lord *Cairns*. (2) Law Rep. 2 Ch. 578.
(3) Law Rep. 2 H. L. 325.

ought to be refused in so far as it prays that the name of *Waterhouse* should be included in the list of contributories.

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Interlocutor reversed, and cause remitted to the Court of Session, with instructions to dismiss the Petition of the official liquidator in so far as it seeks to include the name of the Appellant among the contributories.

Solicitors for the Appellant: *W. M. Wilkinson.*
Solicitors for the Respondent: *Williams & James.*

KEITH . . . . . APPELLANT;
MRS. REID . . . . . RESPONDENT.

1870
June 16.

Retail Shop—Auctions, when allowable.

In a retail shop sales by auction are allowable unless prohibited by the agreement between the landlord and tenant.

So *held* by the House of Lords, reversing a judgment of the Court of Session, which had ruled (*diss.* the Lord Ordinary and Sheriff) that in a retail shop sales by auction were *not* allowable, unless permitted by the agreement.

Per LORD WESTBURY:—To hold that under the lease of a shop, a back shop, and a cellar, there is necessarily inherent in the subject a prohibition against the use of it for the sale of goods occasionally by public auction, is a proposition which, I think, cannot be sustained.

The Litigation—Regret expressed.

Per THE LORD CHANCELLOR:—MRS. *Reid* is to be pitied for the course into which she has been dragged,—evidently without any consciousness on her part of the extreme folly of these proceedings.

IN this case the Court of Session (reversing the judgment of the Lord Ordinary (1)) held, that where a shop in *Aberdeen* had been let by Mrs. *Reid* to the Appellant for the purposes of his business, it was illegal in him to use it, even occasionally, as an auction room. Mrs. *Reid* sought an interdict from the Sheriff, but he refused it—there being no evidence of any agreement or stipulation against auctions. Mrs. *Reid* thereupon advocated the case to the Lord Ordinary, who held that in the absence of express prohibition there was no principle which rendered sales by auction "in

(1) Lord *Jerviswoode.*

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a shop within burgh" illegal. His decision, however, was reversed by the Second Division of the Inner House, and hence the present appeal to the House.

Sir *Roundell Palmer*, Q.C., and Mr. *J. T. Anderson*, were of Counsel for the Appellant.

The *Lord Advocate* (1) and Mr. *Pearson* for the Respondent.

The following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (2):—

My Lords, that your Lordships' time should have been occupied, to the great detriment of other suitors, with such a case as the present, is, perhaps, one of the least grievances of a litigation which has been going on now for about seven years and a-half.

The Sheriff declined to grant the interdict sought upon hearing the witnesses *vivâ voce*,—having both the Appellant and the Respondent before him, and seeing their demeanour,—and being able, therefore, to form a better judgment than we can of the weight which ought to be attributed to the evidence given by them; and he came to the conclusion that the case was not made out in support of the application; namely, by evidence of an express and distinct agreement or condition against auctions on the premises.

The Lord Ordinary had further evidence before him, and he came to the same conclusion.

I can, therefore, my Lords, only say, that this lady is greatly to be pitied for the course into which she has been dragged,—evidently without any consciousness on her part of the extreme folly of these proceedings. We can do nothing else than reverse this decision which has been come to by the Inner Division of the Court of Session.

LORD CHELMSFORD:—

My Lords, I cannot help agreeing with my noble and learned friend in his expression of regret that such litigation should have occurred upon this subject, and that the parties should have been subjected to so much expense upon a question confined to the short period between October and June 1863.

(1) Mr. *Young*, Q.C. (2) Lord *Hatherley*.

I entirely agree that this decision of the Court of Session must be reversed.

LORD WESTBURY:—

It may be instructive to the people of *Scotland* to examine this case a little further in order that they may see the lamentable consequences which arise from the state of the procedure in their Law Courts, and the abuses of that procedure which take place.

The law of *Scotland* may well be, that if there be a lease of a dwelling-house as a dwelling-house it shall not be perverted to a perfectly different purpose. It may not be turned into a beer-shop, it may not be turned into a manufactory, it may not be converted into an open shop. That may well be allowed to be the law; but to hold that under the lease of a shop, a back shop, and a cellar, there is necessarily inherent in the subject a prohibition against the use of it for the sale of goods occasionally by public auction is a proposition which, I think, cannot be sustained. But that is the only proposition on which this interlocutor rests. That the interlocutor, therefore, must be reversed I cannot have one particle of doubt.

The judgment of the Sheriff in this case might well have been conclusive; but, admitting of an appeal, it was carried before the Lord Ordinary. From his decision there was an appeal to the Inner House, and from the decision of the Inner House another appeal comes here. So that these unfortunate litigants are placed at the mercy of their legal advisers. All, however, that we can do, besides expressing our regret, is to reverse the interlocutor complained of.

LORD COLONSAY concurred.

Ordered:—That the interlocutors complained of be reversed, and that the reclaiming note against the interlocutor of the Lord Ordinary be refused with expenses (1).

Solicitor for the Appellant: *A. Hendry.*
Solicitor for the Respondent: *W. Robertson.*

(1) The case is reported below, 3rd Series, vol. vi. p. 768, and in the *Scottish Jurist*, vol. xl. p. 393.

1870
June 17.

FRASER . . . . . APPELLANT;
CRAWFORD *et al.* . . . . . RESPONDENTS.

Costly Litigation—Expressions of Regret.

Per LORD CHELMSFORD:—It is really lamentable to think of the enormous expense incurred in this case.

Per LORD WESTBURY:—Such things occur in the appeals from *Scotland* day by day.

THE action out of which this appeal arose was instituted by Mr. *Fraser*, a merchant in *Glasgow*, to have an arbiter's award set aside as *ultrà vires* under the reference.

The defence was, that the arbiter had not exceeded his authority, and that his award had been acquiesced in. The Court of Session (First Division) sustained this defence, and gave judgment against Mr. *Fraser*, who appealed to the House.

The *Lord Advocate* (1), and Mr. *Mellish*, Q.C., were of Counsel for the Appellant.

The *Dean of Faculty* (2), and Mr. *Shiress Will*, for the Respondent.

Without calling on the Respondents' counsel the Law Peers delivered judgment as follows:

THE LORD CHANCELLOR (3):—

My Lords, in this case complaint is made of a decision pronounced by the Court of Session sustaining defences to an action brought by the Appellant to reduce and set aside an award. Having well considered the case, I think, my Lords, that the interlocutor complained of ought to be affirmed, and the appeal dismissed with costs.

LORD CHELMSFORD:—

The value of the subject matter in litigation between these parties is the sum of £80, to which the Respondent claims to be

(1) Mr. *Young*, Q.C. (2) Mr. *Gordon*, Q.C. (3) Lord *Hatherley*.

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v.
CRAWFORD.

entitled. And it really is lamentable to think of the enormous expense which has been incurred in the case. The referee states that there was a voluminous proof which extended over upwards of three years, and embraced about forty meetings with the parties, who have wound up their pleadings with a *vivâ voce* debate, the length of which is not stated.

The question is, whether the referee was authorized to take into consideration certain extra work done by the builder of a house sold by the Respondent to the Appellant. In my opinion it was clearly within the authority of the referee to decide upon these extras. The appeal must be dismissed.

LORD WESTBURY:—

This litigation, at the end of I do not know how many years (1), has terminated in an appeal to this House. A controversy so exceedingly minute in point of value would naturally excite one's indignation, if it were not that such things occur in the appeals from *Scotland* day by day; and it appears useless to complain.

LORD COLONSAY concurred.

Interlocutors affirmed, and the appeal dismissed with costs.

Solicitors for the Appellant: *Loch & Maclaurin.*
Solicitors for the Respondents: *Holmes & Co.*

(1) The reference to arbitration was in February, 1858.

1870 CAPTAIN HANS GEORGE LESLIE . . APPELLANT;
June 20. GORDON MACLEOD *et al.* . . . . . RESPONDENTS (1).

ET E CONTRÀ.

Heir Male—Charge on him for Younger Children.

12 Sc. 67
Port 219

Where, by ante-nuptial articles and post-nuptial settlement, the intending husband conveyed his estate to "himself and the heir male of the marriage," and bound himself, and his heirs and successors whomsoever, to pay £16,000 "to the younger child or children of the marriage," it was *held* by the House, affirming the decree below, that there should be no proportionate distribution of obligation between the heir and the younger children, but that the heir alone should make good the £16,000, although the estate which he inherited was worth only £28,000, and the free executry, or personalty, was but £1500.

Per THE LORD CHANCELLOR:—Taking as heir, there is nothing to shew that the Appellant is to be exempted from the ordinary conditions of heirship.

Per LORD WESTBURY:—The moment you clothe the Appellant with the estate as heir he becomes a mark for the liabilities of the law. He takes *nomine et titulo hæredis*, and the obligations incident to the inheritance must be fulfilled by him.

BY ante-nuptial articles, dated the 4th of March, 1820, between *Hans George Leslie*, of *Dunlugas*, in the county of *Banff*, and Mrs. *Mary Brebner*, widow,—the intending husband "bound himself to convey his estate to himself and the heir male of the marriage in fee, and also to secure to the younger children £16,000." The parties agreed to execute a regular settlement; and, afterwards (the marriage having been duly celebrated), in pursuance of the articles, the husband and wife executed, on the 25th of March, 1820, a formal deed, whereby the husband "disponed and conveyed his said estate to himself and the heirs male of the said marriage." And he further bound and obliged himself and his heirs and successors whomsoever to make payment of the sum of £16,000 "to the younger child or children of the marriage."

The wife, Mrs. *Leslie*, died in 1836, survived by four children—two sons and two daughters. The husband died in 1856, having

(1) Reported fully in the 3rd Series, vol. vi. p. 445; and in the *Scottish Jurist*, vol. lx. p. 229.

survived his eldest son and his youngest daughter, both of whom had died unmarried.

The question in the present case arose between the youngest son, the heir, Captain *Leslie*, and the husband of the eldest daughter;—she having, in 1854, become the wife of the above Respondent, *Gordon Macleod*, of *Lochbay*, in the *Isle of Skye*.

It appeared that the deceased father's personal property had greatly sunk in value before his death. He consequently bethought himself that £16,000 for one daughter was too heavy a charge to cast upon his heir—the estate of *Dunlugas* being worth but £28,000.

Acting under this impression, Mr. *Leslie*, in April, 1856, shortly before his death, executed a deed for the purpose of securing a provision of £5000 for Mrs. *Macleod*. This deed was meant to be in substitution of the marriage articles and settlement of 1820, which, under the circumstances, Mr. *Leslie* conceived himself entitled to supersede, and which he, at all events, concealed—so that not only the heir, but Mrs. *Macleod* and her husband were wholly ignorant of the existence of the articles and settlement of 1820.

In this state of ignorance Mrs. *Macleod* and her husband accepted from Captain *Leslie* the £5000 secured by the deed of 1856, and gave him a release and discharge.

Mrs. *Macleod* died in ignorance of the concealed documents of 1820; but not long afterwards they came to light, and a suit was instituted to establish them. In that suit the Court of Session declared their validity by "a decree of proving the tenor." (1)

This being done, Mr. *Macleod*, on the 23rd of March, 1863, instituted, on behalf of his children and on his own behalf, a suit in the Court of Session to have the articles and settlement of 1820 enforced against Captain *Leslie;* insisting, moreover, that the payment and discharge of the £5000 in no respect affected the Pursuer's claim for the £16,000.

Captain *Leslie* put in a defence denying his general liability, as his service, *quâ* heir of *Dunlugas*, had been expede in ignorance of the articles and settlement of 1820. But he maintained that "in any view the £5000 must be imputed in part payment of any sum found due in the action."

(1) For the particulars, which are truly curious, see the Scottish Reports.

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The Lord Ordinary (1) gave judgment in favour of Captain *Leslie*, holding that, as heir of the marriage, he was entitled to the *Dunlugas* estate on a footing of right not less complete in itself than that of the younger children.

Mr. *Macleod* reclaimed to the First Division of the Inner House, praying their Lordships to recal the Lord Ordinary's interlocutor, and to sustain "the Pursuer's claim, *quoad* the whole provision of £16,000."

The First Division were equally divided in opinion. They, therefore, directed that the cause "should be argued before the Inner House Judges of both Divisions."

The First Division, on the 5th of February, 1868, "in conformity with the opinions of the whole seven Judges," recalled the Lord Ordinary's interlocutor; and having afterwards, on the 21st of February, 1868, resumed consideration of the case, they gave judgment that Captain *Leslie* should pay to Mr. *Macleod* £11,000, with interest from Martinmas 1856;—thereby, in effect, giving credit to Captain *Leslie* for the £5000 which he had already paid to Mr. and Mrs. *Macleod* (2).

Against this judgment both parties appealed to the House; Captain *Leslie* complaining of the award of £11,000, and Mr. *Macleod* of the order requiring him to give credit for the £5000.

Sir *Roundell Palmer*, Q.C., and Mr. *Lancaster*, were heard for Captain *Leslie*.

Mr. *Anderson*, Q.C., and Mr. *Nevay*, for Mr. *Maclean*.

The following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (3):—

My Lords, as regards the appeal of Captain *Leslie*, it appears to me that the determination of this case rests upon the construc-

(1) Lord *Jerviswoode*.

(2) Lord *Deas* dissented from this judgment, agreeing with the Lord Ordinary, and holding that the obligations under the articles and settlement of 1822 should be distributed "proportionally so far as the heritable and moveable estate taken together would yield." Lord *Deas* quoted the following illustration from a judgment by Lord *Jeffrey*: "If," says Lord *Jeffrey*, "the heir is bound to pay the younger children £15,000, and the estate turns out to be worth only £15,000, the heir, though the favoured object of affection, will get nothing:" *Russell's Case*, 13 Shaw, 551.

(3) Lord *Hatherley*.

tion of a single sentence of the settlement, and that the construction of that sentence may be arrived at in a very few words.

When this settlement was executed Mr. *Leslie* had considerable property besides this estate of *Dunlugas*, and it having happened at his death that there was nothing out of which the £16,000 which he had engaged should be paid to the younger children of the marriage could be paid, other than *Dunlugas* itself, the question arose whether Captain *Leslie* was entitled either to retain *Dunlugas* free of all claim in respect of the £16,000, or, if not, whether he was entitled to retain it in such a manner as that an apportionment should be made between the value of the estate and the £16,000, in order that the intention of the instrument might be completely effected; the alleged intention being that the son was to have the estate as much as the younger children were to have the £16,000.

I have come, my Lords, to the conclusion which was arrived at by the majority of the Judges in *Scotland*, namely, that what was engaged to be made over to the son is simply the inheritance, the father remaining fiar, and the son coming into possession of it simply as heir male of the marriage, and by virtue of his quality of heir. If that be so, then it would appear beyond all doubt that the heir of provision is liable to the burdens that may be incident to the circumstance of his becoming interested in the estate simply *quâ* heir—that is to say, he must bear the burdens which have been created by his father.

It has been argued in support of this appeal, that as the eldest son of the marriage it was at least intended that the Appellant should not have a benefit inferior to that of the younger children; and still less could it have been meant that the younger children should deprive him of the whole benefit of the instrument.

It is said, can it be possible to conceive that Mr. *Leslie* intended his heir to have nothing, or next to nothing, in an event which might happen, and that he intended his other child, the daughter, to have the whole benefit of the estate? That is reasoning from the circumstances which have afterwards happened. I do not suppose that either the one thing or the other was present to the father's mind at the time of the instrument being executed. There is no indication whatever of any intention that the heir of the

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marriage is to take the property on any other condition than as heir. And he, taking it as heir, there is nothing whatever in the instrument saying that he is to be exempted from the ordinary conditions attached to heirship.

The argument is, that there is an equal *jus crediti* between the son and the younger children. Be it so. *Jus crediti* as to what? A *jus crediti* of the son to have the estate as heir subject to all the conditions of the estate which the heir takes; and a *jus crediti* of the younger children to take the £16,000. Each is to have the property respectively assigned. And it is only the circumstances which have since occurred which render it unfortunate that the provision assigned to the son, subject to this condition, should be diminished by the necessary payment.

I cannot arrive at the conclusion at which Lord *Deas* arrived, that you are to make an apportionment between the son and the daughter, looking at the value of the estate on the one hand as £28,000, and the value of the provision for the daughter as £16,000, and then saying that as in consequence of the failure of other means of the testator the son is incapable of taking the whole property free from debts, there should be a just apportionment made between them. I am at a loss to find anything upon the face of the instrument leading to that conclusion. There is no authority which justifies the Appellant's conclusion when he says that he, coming in as heir, is entitled to be liberated from the consequences of being heir.

In the cross appeal, however, Captain *Leslie*, says: "If you insist upon payment of £16,000, you cannot retain the £5000 which I made over to you in ignorance of the settlement." The Court below were clear in holding that the £5000 must be deducted. And I, my Lords, am of the same opinion; so that I have only to move that the decisions complained of be affirmed.

LORD WESTBURY:—

My Lords, this is a case of an interesting nature, as illustrating the difference between the jurisprudence of *Scotland* and that of *England* with reference to real estate. It tends to shew, what is otherwise abundantly clear, that property in land is not to be

determined or regulated by any abstract rules of justice, but that it depends only on the positive institutions of the country; and that by those institutions the title to property in land, its ownership and enjoyment, must be regulated.

Now, here we have an ante-nuptial contract expressing in a very few words an engagement by the intending husband, that he will settle the estate to himself and the heir male of the marriage, in fee. That ante-nuptial contract being an agreement, if it had come to be construed by English law, it is probable that a Court of Equity would have expanded the words "the heir male of the marriage" into "the first and other sons of the marriage." And the sons of the marriage under the proper limitations for that purpose would have taken as purchasers absolutely in remainder expectant on the death of the father, and expectant on the decease of the eldest sons in succession, without having barred the entail. They would have taken, therefore, purely as singular successors, and each son would have been wholly exempt from the obligations of the father, the settlor. The reason is plain, because marriage is the highest consideration known to the law, both in *Scotland* and in *England*. The sons, therefore, would have become entitled precisely as if they themselves had been purchasers, or singular successors to the father, who would have been reduced to the character of tenant for life only. The same form of words is followed in the post-nuptial settlement; and supposing it had occurred in an English conveyance passing the fee simple, probably the effect would have been that the words "heir male of the marriage" would have been held to be equivalent to the words "heir male of the body of the father begotten of his intended wife" which would have been a limitation in special tail. That probably would have united with the father's life estate, and would have given the father an estate tail corresponding to that limitation. But in *Scotland* the rule is entirely different. It is said that the heir male of the marriage has a *jus crediti;* that is a right by contract to the thing to be given to him. But when you come to examine the meaning of these words it seems to be clear that according to the law of *Scotland*, his father cannot by any gratuitous gift, much less by any fraudulent gift, deprive him of his right to receive the estate in the capacity of heir male of the

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marriage. And it appears to be clear that the words "heir male of the marriage" are nothing in the world more than the description of the heir who takes *ex provisione*. The heir has a right to have the estate preserved from any gratuitous alienation; but taking it as heir he takes it as an inheritance; and there is inveterate in the character of heir, this consequence also, that he must take subject to the onerous debts and obligations of the ancestor. He takes therefore in a very peculiar manner. His *jus crediti* does not amount to an absolute obligation for value; but it does amount to a title that deprives the father of the right of defeating it otherwise than by onerous obligation. Probably, though it is unnecessary to consider that, it leaves the father at liberty to defeat it by any obligation contracted in pursuance of such natural and moral duty as the obligation of providing for a child, or of granting a jointure to a widow. Such being the right of the heir, there could have been no dispute that the heir would have been liable to pay this sum of £16,000, if it had been the result of an ordinary transaction or contract between the father and a stranger for valuable consideration.

That being the state of the law—about which there can be, I think, no doubt whatever—it appears to have occurred to the mind of these parties, and also to the mind of the Lord Ordinary, that possibly the case of the children might be taken out of the character of onerous obligation, seeing that the engagement in favour of the children is contained in the same instrument that contains the engagement in favour of the heir. And therefore it was said that the *jus crediti* of the one must be in every respect equal to the *jus crediti* of the other. If you consider the heir as entitled to the estate by that species of contract, I consider the children as entitled to the estate by the same description of contract. They necessarily compete with one another. There is a co-equal right, and it would therefore lead to the notion that the subject should be parted rather than that the subject should be liable to be altogether swallowed up by the one to the entire detriment and loss of the other.

That view of the case appears to have struck the mind of the Lord Ordinary, and to have been received and embodied by him in his interlocutor. But, in reality, it involves a fallacy; because

when you are speaking of the *jus crediti* of the heir, you substitute for his inheritance and right of heirship to which that *jus crediti* leads, the estate itself, and by that fallacious substitution of one subject of right for another subject of right, you come then to the conclusion that the heir is entitled under the contract to the estate, and that the other children are entitled under the contract not to a charge upon the estate, but to a provision by the father. Now, that is not so. It is a technical distinction; but in reality it is a distinction which is essential to be preserved in order to preserve the distinctive view of the law of *Scotland*. The *jus crediti* of the heir is in the character of heir; and it is a right to receive the estate *eo nomine et eo titulo*. He takes the estate, it is true; but he takes it as an inheritance. He takes the inheritance, it is true, by virtue of the engagement, but when he takes the inheritance by virtue of the engagement, he takes it *ex provisione patris*, and he becomes, therefore, in the eye of the law, what is properly denominated *hæres ex provisione*. That is a more favoured class of heir, but it is still as heir. And what he takes he takes *nomine et titulo hæredis*. And whatever obligation the law casts upon that inheritance, must be fulfilled by him. For the obligation contained in the settlement is exhausted, and the settlement is *functus officio* as soon as the estate is secured to devolve on the heir of the marriage *nomine et titulo hæredis*. Then the law attaches all the other consequences; and it is a mistake to suppose that they come from the contract—they come from the law. The *hæres ex provisione* is liable to onerous obligations; he is liable in the last resort personally, and all the estates taken by the heir of line of the father are to be discussed and applied in the first place before you have resort to that estate which vests in the heir *ex provisione*. But that is a consequence of law; and you cannot exonerate the person who fulfils the character of *hæres ex provisione* from those liabilities of the inheritance. It was therefore (with great respect I say it) a mistake on the part of the Lord Ordinary, to say that the heir of the marriage was entitled to the estate. He was entitled to the estate as an inheritance. He was entitled to be clothed with the estate as heir; but the moment you clothe him with the estate as heir, he then becomes a mark for the liabilities of the law.

Then, it is said, that the eldest son of the marriage will be in a

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less favourable situation than the daughter. But the daughter takes under the ante-nuptial contract, and takes therefore under the provision for the children of the marriage, and the provision made for them is in every respect of the term an onerous obligation.

But there is a desire not only to get hold of the £16,000, but to get the £5000 *plus* the £16,000. Plain justice dictates that the £5000 shall be imputed to the £16,000 as a part payment.

I have no doubt, therefore, that the Judges in the Court below arrived at a correct conclusion, and I must therefore submit to your Lordships that it be affirmed. It will be for your Lordships to consider how we are to deal with the costs of that cross appeal, which contradicts every proper feeling, and in which the Appellant comes here with the hope of claiming £5000, in addition to the £16,000.

LORD COLONSAY:—

I concur in the judgment proposed to be pronounced.

LORD WESTBURY:—

Of course, we affirm the interlocutor complained of in the original appeal. We also affirm the interlocutor complained of in the cross appeal. Now, the costs are so blended and intermingled that although your Lordships' general rule is that costs always follow the event, yet in this particular case perhaps it may be best, in order to avoid that complication, if your Lordships come to the conclusion to dismiss both appeals without costs.

Interlocutors complained of affirmed, and both appeals dismissed without costs.

Solicitors for the Appellant: Messrs. *Martin & Leslie.*
Solicitors for the Respondents: Messrs. *Crosley & Burn.*

GRAY . . . . . APPELLANT; 1870
TURNBULL . . . . . RESPONDENT. *June* 23.

Appeal on Matter of Fact.

Per LORD CHELMSFORD:—An appellate tribunal ought not to be called upon to decide which side preponderates on a mere balance of evidence. To procure a reversal it must be shewn irresistibly that the judgment complained of on a matter of fact, is not only wrong, but entirely erroneous.

Protracted Litigation.

Censure pronounced by the Law Peers on the protracted litigation of cases involving but a small amount of property.

THIS was an action brought in March 1865 by Mr. *Turnbull* of *Bellwood* in the county of *Perth*, to have it judicially ascertained and declared that he and his predecessors had the sole and exclusive right to "a just and equal half of two acres of land" described in the pleadings.

Mr. *Gray* resisted the action,—insisting that the "angle of ground in dispute" was *his*, and that although only eight square yards in extent, and not worth five shillings intrinsically, it was important to him for access to his other property.

A long proof was gone into before a Commissioner. Forty witnesses were examined.

After an elaborate examination of the oral testimony, and of a voluminous correspondence admitted as evidence, the Court of Session (First Division) gave judgment in favour of Mr. *Turnbull*, and condemned Mr. *Gray* in expenses.

Sir *Roundell Palmer*, Q.C., and Mr. *Mellish*, Q.C., addressed the House in support of Mr. *Gray's* appeal.

The Lord Advocate (1), and Mr. *Eneas Mackay*, for the Respondent, Mr. *Turnbull*, were not called upon.

LORD CHELMSFORD (2), after observing that the litigation was

(1) Mr. *Young*.
(2) His Lordship, in the absence of the Lord Chancellor, occupied the woolsack.

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unneighbourly, and ought to have been compromised, proceeded as follows:—

The learned counsel for the Appellant have brought before your Lordships all the evidence which supports his case; but I submit that they have not demonstrated that the judgment of the Court of Session is erroneous.

This, my Lords, is a question of fact on which there are the concurring decisions of two Courts, and of no less than five Judges; and, therefore, it seems to me to be absolutely essential, on principle, to hold the Appellant's counsel to the necessity of not merely shewing that there may be some ground for doubt in the case, but to satisfy us convincingly and conclusively that the judgments complained of are entirely wrong.

Upon a question of fact an appellate tribunal ought not to be called upon to decide which side preponderates on a mere balance of evidence. Different minds will, of course, draw different conclusions from the same facts; and there is no rule or standard which can be referred to by which the correctness of the decision either way can be tested. If we were upon the present occasion to come to the conclusion that the five Judges who have decided in favour of the Respondent miscarried, we should be just as likely to be wrong in our conclusion from the facts as they were in deciding the other way. And, therefore, if there is to be an appeal on questions of fact (and I regret that there should be such) I think that this principle should be firmly adhered to, namely, that we must call upon the party appealing to shew us irresistibly that the opinion of the Judges on the question of fact was not only wrong, but entirely erroneous.

Concurring, therefore, as I do with the Court below, I must advise your Lordships to affirm the decision complained of, and to dismiss this appeal with costs.

LORD WESTBURY:—

It is to me a constant subject of grief that there should be in *Scotland* the power to litigants of coming on the most trifling matters to your Lordships' House. The result is, that the time of the greatest tribunal in the land is occupied with the most in-

significant matters; and further, the expense and misery occasioned are augmented indefinitely by this power of prolonged litigation.

In the English tribunals, when a question of fact has once been decided by the verdict of a jury, it requires an overwhelming case of error by the jury, or the disregard of some cardinal rule of law, to induce the Court to grant a new trial. Unquestionably, I should have pressed upon your Lordships to abide by that rule if it had not been that the case now brought before us has, unfortunately, been decided, not on evidence taken in the presence of the Court, but upon the written depositions of witnesses—and it has been the practice in Courts of Equity, where that mode of taking evidence prevails, to allow appeals on matters of fact, although the Court below has felt no hesitation in the conclusion to be arrived at on the depositions.

But if we open the door to an appeal of this kind, undoubtedly it will be an obligation upon the Appellant to prove a case that admits of no doubt whatever.

LORD COLONSAY concurred, and the judgment appealed from was affirmed with costs.

Solicitors for the Appellant: *Loch & Maclaurin.*
Solicitors for the Respondent: *Martin & Leslie.*

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THE CALEDONIAN RAILWAY COMPANY Appellants;
Sir WILLIAM CARMICHAEL, Bart., *et al.* Respondents (1).

Interest upon an Unsettled Claim.

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Where a pecuniary claim has been left by the creditor for years unascertained and unexamined, the debtor having always been ready and willing to meet the demand, it was *held* by the House, reversing the decision below, that the right to interest on the principal sum did not commence until after the debt had been established, and the precise amount settled.

A sheriff's jury, awarding compensation to a landowner against a railway company in 1864, found that so far back as 1852 he was entitled to £5272; saying, however, nothing as to interest. The Court below added to the principal sum twelve years' interest. Their order reversed.

Per Lord Westbury:—Interest can be demanded only in virtue of a contract, or where the principal money has been wrongfully withheld.

Costs of a Railway Compensation Trial.

By adding the twelve years' interest to the sum which the jury had awarded, it was made to exceed the original offer of the company, and, consequently, the Court below allowed the landowner his costs of the inquiry. Reversal by the House.

Sheriff's Jurisdiction.

The sheriff's jurisdiction in cases of railway compensation is exclusive and final.

Special Railway Act.

Where a railway company's special Act incorporated clauses of the general statutes, regulating ordinary proceedings, it was *held* that the ordinary course of proceeding should exclusively have place; and an action brought to alter what had been done in conformity with such ordinary proceeding, was declared by the House to have been *incompetent.*

On the 25th of March, 1864, Sir *William Carmichael* served a notice on the above company requiring them to ask the Sheriff to summon a jury under the *Lands Clauses Consolidation (Scotland) Act,* 1845, unless they would agree to pay him £33,013 4*s.* 4*d.* as compensation for the stoppage by the railway of the works of the *Hailes Stone Quarry,* his property. The company declined to pay the money demanded, but made a tender of £7005; which being rejected, a special jury was summoned, and a trial took place

(1) Reported 3rd Series, vol. vi. p. 683, and in the *Scottish Jurist,* vol. x. p. 347.

before the Sheriff, resulting in a verdict "that the rock under the railway was 260 feet long by 90 feet wide, and that the value thereof was, on the 5th of December, 1852, £5272."

The Sheriff, on the 25th of July, 1864, gave judgment conformably to the verdict; and, inasmuch as it was for a less sum than had been tendered, he found Sir *William* "liable in one half of the expenses incurred."

Sir *William*, by advocation, brought the case before the Court of Session, insisting that the Sheriff ought to have awarded interest on the £5272 from December, 1852, and also expenses; for that £5272 with interest from the 5th of December 1852 would have been more than £7005, the sum tendered.

The company objected to the proceeding as incompetent, the Sheriff's decree having been made by authority of the *Lands Clauses Consolidation (Scotland) Act*, 1845, and not subject to advocation.

The Lord Ordinary repelled the objection to the competency of the advocation, and remitted the cause to the Sheriff, with instructions to recall "that part of his interlocutor which found Sir *William* liable in one-half of the expenses incurred." The Sheriff, on the 11th of April, 1866, recalled his order accordingly.

It was under these circumstances that Sir *William Carmichael* commenced, on the 10th of May, 1866, the action out of which the present appeal arose, concluding for payment of the £5272, with interest at 5 per cent. from the 5th of December, 1852; and for a declaration that the company were bound to make payment to him of "all reasonable charges" incident to the inquiry before the Sheriff, as well as the costs of this action.

The Lord Ordinary decided in favour of Sir *William*. The company reclaimed. The Inner House (First Division) adhered. Whereupon the company appealed to the House, not complaining of the order for payment of the £5272, with interest from the 25th of July, 1864, the date of the verdict—but complaining of the order for payment of interest from the 5th of December, 1852, and expenses.

The company had for their counsel Mr. *Mellish*, Q.C., and Mr. *Cotton*, Q.C.

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The *Lord Advocate* (1), Sir *Roundell Palmer*, Q.C., and Mr. *Rutherford*, appeared for Sir *William*.

THE LORD CHANCELLOR (2):—

My Lords,—The special Act of the company for making a railway from *Carlisle* to *Edinburgh* and *Glasgow* embodied, by one of its earliest clauses, the *Railways Clauses Consolidation (Scotland) Act*, 1845, and the *Lands Clauses Consolidation (Scotland) Act*, 1845—so that, as regards any ordinary property taken in the execution of the railway works, the ordinary course would have to be followed.

In the special Act of the company (1845) there is the following clause (the 24th section):—

Whereas the railway passes over the quarry-field of *Hailes*, belonging to Sir *Thomas Carmichael;* be it enacted, that beyond and in addition to the value of the surface land to be taken under the Act from the said Sir *Thomas Carmichael*, there shall be paid by the said company the value of the whole stone situate under the surface of the land so to be taken which the railway company shall decline to allow Sir *Thomas Carmichael* to work by tirring or removal of the surface therefrom; and the extent and quality of the stone so to be purchased by the company shall be ascertained in the same manner as in ordinary cases of disputed compensation: *Provided always, that the value of the said stone shall be payable by the said company from time to time, when and as often as a face of rock at least* 130 *ft. in length is worked up* to the north or south boundary of the railway, such payment to be only to the extent of the value of the stone opposite to such face.

Now, my Lords, if I had simply to read this by the light of the Act of Parliament, and without the comments of the learned Judges who have decided this case, I should have said that the clear construction would be that there was a something to be bought beyond the surface land of Sir *Thomas Carmichael*. The surface land clearly had to be valued and dealt with by the conjoint operation of the special Act and the *Railways Clauses Consolidation (Scotland) Act*, 1845, which refers all these valuations to the provisions of the *Lands Clauses Consolidation (Scotland) Act*, 1845, and the usual course would be pursued. That would apply clearly to the surface, and there is no doubt about that part of the case, nor is any question raised on it.

Then what does the special Act further go on to say? It appears to me to say simply, that, in addition to the value of the

(1) Mr. *Young*. (2) Lord *Hatherley*.

surface, the value of the stone shall be given. That is the short construction of the clause. But the value of the stone is to be ascertained in a particular way. In the first place, the indication of the quantity wanted by the company is to be the tirring or the removing of the turf. And the company having done that, there at once arises on the part of the proprietor of the stone a right to make his claim. If the parties cannot agree as to the amount to be paid, there arises the necessity of determining it by a jury.

There are two provisions: one is, that the owner of the quarry is to cease to have any right to deal with the stone the moment the surface is removed; and the other is, that the value of the stone is to be ascertained in the manner prescribed, and is to be only payable from time to time when a certain event has taken place, namely, when a certain face of rock has been worked "up to the north or south boundary of the railway;" and then the payment is to be "only to the extent of the value of the stone opposite to such face." In other words, the Legislature seems to have considered that the complainant is entitled to be paid for all stone then he is prevented working; but inasmuch as the stone would not be valuable to him, supposing he were entitled to work it, until he had opened a face in the quarry from which the stone could be worked, the date of purchase is to be taken to be from the time when the stone might have been rendered available by the process here described. And, therefore, he is to have valued to him from time to time, when this face of rock is exposed, the quantity and value of the stone opposite to that face. And I apprehend that the true course of proceeding in working out this clause would be, not to value the whole amount of stone the surface of which shall have been removed, but from time to time, when the proprietor shall have put himself in a condition to demand payment—and then he is to demand payment only to the extent of the value of the stone opposite the face of stone which is opened. When he has opened the face it is time for him then to make his claim, and to send in his demand on account of that which is to be valued, and that will be valued by the jury.

What is there, then, to prevent the whole operation of the *Railways Clauses Consolidation (Scotland) Act*, 1845, and the *Lands Clauses Consolidation (Scotland) Act*, 1845, to which the *Railways*

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Clauses Act refers, taking place, namely, that this is to be valued like any other piece of land which is purchased. The *Railways Clauses Consolidation (Scotland) Act*, 1845, says expressly that all land purchased for such undertakings shall be valued according as the *Lands Clauses Consolidation (Scotland) Act*, 1845, prescribes. Here are two things to be considered—the surface of the land, which is to be valued without any special direction, and the quarry, which is to be valued according to a special direction, in order not to pay the person who has the quarry before the property is made available which he is desirous of being paid for. And then, from time to time, when he is entitled to be paid for it, he may proceed to summon a jury, and so to obtain payment.

This action raises two questions—the question of expenses, and the question of interest. The Court below have come to the conclusion that inasmuch as the interest on £5272 will make the aggregate sum considerably to exceed the tender, the company is liable for all the expenses which attended the investigation.

We have to consider whether or not this action was competent, regard being had to the jurisdiction which is conferred upon the sheriff by the Acts of Parliament; because, if the true construction of these Acts be such as it occurred to me is their true construction, then they have provided for this case, as they have for every other case of compensation.

In any ordinary case of land being taken from a landholder, although the landholder might, without any fault of his own on the one hand, and without any fault of the company on the other, have been rather dilatory in making his claim in respect of the money found to be due to him, it would not be doubted that the whole matter would be a matter to be decided by a jury. With reference to the value of the ground, the jury would not be able to award interest in respect of that delay. They would simply find the value of the land, the Sheriff would issue his process, the sum would be recovered, and the costs would be governed by the principles enunciated by the Legislature with respect to tender.

The whole case is, therefore, resolved into this question, whether or not it must be dealt with according to the ordinary procedure. The Act says that there shall be no money payable until a cer-

tain time, and that the value only of that which is ascertainable in that particular event which is to make the money become payable by the company is to be valued and to be paid. And therefore it would be an unreasonable course for the proprietor of the quarry to ask for a valuation of his whole quarry before that event had happened, and before any money could possibly be payable to him. The proper course would be, when the time had come at which the money was payable to him, to ask to have the value ascertained which then would be payable, and not to have the value of the property all ascertained in a lump immediately after the passing of the Act, before anything had been done which could possibly indicate to the jury what the property was which was then to be paid for. The Lord President says:—

"Then this inquiry and this dispute may be repeated, because there may, after the lapse of some more years, be another face of rock of 130 feet wrought up to the boundary of the railway, and then another demand, in like manner, will take place."

I have no difficulty in saying that what the owner of the quarry is to be paid is a thing to be ascertained on each occasion; and that there is no necessity for ascertaining what is to be paid before the time comes when the payment is to be made, and the property is to be valued.

The Lord President proceeds to say that there should be some proceeding by which the parties could be put in a proper position in regard to payment not having been made at the time it was claimed, and that that could not be done, as it certainly could not be, by a jury, and therefore it must be ascertained by the Court.

Now I do not think it a correct conclusion (the company being in no way parties to the delay) that in consequence of the valuation not having been made until a long time after it might have been made, therefore the case should be exempted from the operation of the Act,—any more than if it were a case of an estate taken possession of by a company ten years before, which had never been valued till ten years afterwards, in which case it would not have been competent to a jury to have awarded interest. The parties who desire to be paid must suffer if they do not take the

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proper and usual mode of having that payment ascertained, they not having been in any way impeded in getting that payment by anything done, or omitted to be done, on the part of the company.

In the year 1852 the value might have been ascertained, if the parties had taken steps to get it ascertained. But it was not ascertained; and I apprehend, therefore, that there is no jurisdiction raised for the purpose of giving interest, the party whose right it was to recover that interest having failed to take the necessary steps for the purpose.

Therefore, my Lords, as regards the interlocutors decreeing payment of interest, and decreeing also a payment in respect of costs, it appears to me that in both respects they are erroneous, and that so far as complained of we ought now to reverse them.

LORD CHELMSFORD:—

The Judges of the First Division themselves took up the question of jurisdiction, and decided that the action before them was a competent proceeding, "because," as the Lord President said, "it was not the case of a compulsory sale, but of an arrangement or parliamentary agreement between the parties."

In my opinion, however, the case is similar to a case of compulsory taking of land under the *Railways Clauses Consolidation (Scotland) Act*, 1845, and the *Lands Clauses Consolidation (Scotland) Act*, 1845; and the interlocutor of the Sheriff ought to have been treated as final, the 139th section of the *Lands Clauses Consolidation (Scotland) Act*, 1845, declaring that "such judgment shall in no case be subject to review by suspension or advocation or by reduction on any ground whatever."

This introduces a new subject of embarrassment into the case.

It was asked, in the course of the argument, by what right the jury valued the stone as of a date prior to the time of the inquiry, and it was answered that it was by the admission or consent of the parties. But this appears to be incorrect. I find no evidence of any such consent before the Sheriff.

The action, if maintainable, must be founded entirely upon the proceedings before the Sheriff. The interlocutor of the Lord Ordinary, which is adhered to by the Court of the First Division, decerns the Defenders to pay the £5272 (the amount of compen-

sation found by the jury), and also interest thereon from the 31st of December, 1852. This is not enforcing satisfaction of the verdict, but adding to it that which either the jury had no power to give, or having the power did not give.

The course which the Court adopted with respect to the costs and expenses in the Sheriff's Court is, in my opinion, more objectionable. By the 50th section of the *Lands Clauses Consolidation (Scotland) Act*, 1845, in every inquiry before a compensation jury, if the verdict is for the same or a less sum than that previously offered by the promoters of the undertaking, one half of the expenses of the promoters shall be defrayed by the owner of, or party interested in, the lands.

If the action could have been maintained, the interlocutor would, in my opinion, have been objectionable, so far as it relates to the interest on the sum assessed for compensation and the expenses of the inquiry before the Sheriff. Even if it had been agreed that the jury might value the stone as of the date of the 31st of December, 1852, I should have doubted whether it would have been within their province to give interest, their duty under the summons being merely to value the subject matter of compensation. But suppose the jury might have valued at the earlier date, and were bound to have given interest, their verdict was imperfect and defective, and the Court of Session could not add to or supplement it, but all that they could properly do would have been to pronounce a decree of reduction, which, according to the case of the *Caledonian Company* v. *Ogilvy* (1), would have been competent under the supposed circumstances, notwithstanding the 139th section of the *Lands Clauses Consolidation (Scotland) Act*, 1845, and a new inquiry would have taken place before the proper tribunal.

I think the interlocutors appealed from ought to be reversed.

LORD WESTBURY:—

Nothing can be more clearly explained than the proceedings under the *Lands Clauses Consolidation (Scotland) Act*, 1845, as thus stated in the Lord President's judgment:—

As regards the amount of the compensation and the costs of the inquiry, there

(1) 2 Macq. 239.

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is a machinery provided which works the whole thing out without the necessity of any judicial intervention at all.

He goes on to state that the Sheriff, in giving a decree for the amount of the verdict, is not required to consider any question of law or fact between the parties, but to make—

> A mere decree conform to the verdict. And the way in which the costs are made recoverable is entirely matter of diligence. There is no interposition of any judicial act at all.

Therefore, had this been a compulsory sale under the *Lands Clauses Consolidation (Scotland) Act*, 1845, as incorporated in this special Act, there would have been no room whatever for the jurisdiction of the Court of Session.

Now, the Lord President, in his judgment, considered that this was not a compulsory sale under the *Lands Clauses Consolidation (Scotland) Act*, 1845. And consequently, he appears to have regarded the statute as giving authority for two modes of procedure, one a procedure to ascertain the whole value of the stone under the surface occupied by the railway, which he seems to consider might be done immediately after the portion of the land occupied by the railway was ascertained; and then he regards the section giving power to ascertain the amount of money payable as a distinct and separate section, giving rise to a special contract, not the ordinary compulsory contract. The whole case depends, therefore, on the interpretation of the 24th section.

That brings us, then, to the construction of the statute. And, in conformity with the opinions of my noble and learned friends who have preceded me, it appears to me to be perfectly clear that there is no power of effecting a compulsory purchase until a certain amount of stone has been excavated; and the reason appears to be, that it would be very difficult indeed to ascertain the value of unknown quantities and qualities of stone lying beneath the railway. The process, therefore, pointed out was this—that the railway company should prohibit the working by a definite line, when the workings approached so near the railway as to be dangerous, and that then the proprietor of the stone should proceed to unfold the quantity of stone up to that line to the extent of a face of at least 130 feet, and as soon as he had done so, he would

have the right to call upon the company to take by compulsion the whole of the stone opposite to the stone that had been so excavated, and the face of which had been exposed up to the boundary fixed by the company. This portion of the statute, therefore, instead of giving rise to a special contract, is nothing in more than a superadded piece of machinery for the purpose of carrying into effect with greater facility the ordinary provisions for compulsory purchase. It is not a different thing; it is part of the entire thing. There is no contract, except that which arises from the company forbidding the stone quarry-owner to approach nearer than a certain line. That is equivalent in effect to a notice to take the stone; and then the quarry-owner is placed under the obligation of developing the face of the stone to a certain extent in order that the value of the stone may by that process be more correctly ascertained.

The parties regarded this as nothing more than the ordinary mode of effecting a compulsory purchase under the *Lands Clauses Consolidation (Scotland) Act*, 1845, with the addition which became convenient and necessary for the purpose of more easily ascertaining the amount and value of the stone. Therefore we find that a notice is given by the railway company when the quarry-owner approaches the railway with his workings, in the month of February, 1849, by which they determined a red line, which was the line of prohibition beyond which the quarry-owner was not (in the language of the statute) to tirr or disturb the surface of the land. It became, therefore, immediately a notice that within that red line this company agreed to purchase the stone. But before the company could be called on to do so the quarry-owner was under the obligation of developing the face of the rock over at least 130 feet in length. He did so. That appears to have been done by the 31st of December, 1852, for in the 9th article of condescendence—

> It was admitted on all hands that at the 31st of December (1852), the workings of the Pursuer's quarry came up to the red line aforesaid, at which the Defenders had required that the workings should stop, and that a face of rock not less than 260 feet in length was then worked out.

All the conditions of the section of the statute were then fulfilled; and on that day it was perfectly competent to the quarry-

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owner to require the company to pay for the whole of the stone opposite the face of the rock he had so opened out. He did not do so; and the *mora*, or delay, in not ascertaining the amount and value of the stone is attributable entirely to the quarry-owner. The jury, being empanelled for the purpose, proceeded subsequently to ascertain the value of the stone; and they ascertained it, with great propriety, as it stood on the 31st of December, 1852. For that was the day when the conditions of the statute were fulfilled, and when the title of the quarry-owner to have the value of the stone became complete. If he did not choose to prosecute his claim at that time it was his own fault.

The jury having found the value of the stone as on that day, all the functions of the jury, and all the obligations of the statute, were fulfilled. There was no room for any interest to be demanded. Interest can be demanded only in virtue of a contract expressed or implied, or by virtue of the principal sum of money having been wrongfully withheld, and not paid on the day when it ought to have been paid. There was nothing of that kind here, and there is no room for any jurisdiction of any Court to consider the question of interest, that being, if it arise at all, a matter for the jury alone, in determining the amount of compensation, or the amount of purchase-money to be paid.

And, my Lords, in like manner also the question of expenses is a mere consequence, and, as the Lord President properly expresses it, is "entirely a matter of diligence." There was no room, therefore, for the addition of the jurisdiction of the Court of Session to the authority and jurisdiction and powers created by the statute in favour of the Sheriff and of the jury.

I have, therefore, no hesitation in agreeing with my noble and learned friends that there was nothing to be done by the Court of Session; that this action was altogether incompetent; and that the only sum of money payable to the quarry-owner was that found and ascertained by the verdict of the jury; and, inasmuch as the comparison of that sum with the sum tendered by the railway company shews that the tender exceeded the just amount of his demand, the consequence as to costs follows immediately. I agree, therefore, with my noble and learned friends that the interlocutors complained of should be reversed.

LORD COLONSAY:—

I confess I do not regard this case as so free from difficulty as my noble and learned friends do. In the first place, I cannot concur in the construction which they have put on the clauses in the special Act dealing with the substance under the surface. No doubt the *Lands Clauses Consolidation (Scotland) Act*, 1845, and the *Railways Clauses Consolidation (Scotland) Act*, 1845, are incorporated in the special Act. But that substance, if it is to be regarded as a mineral, is not left to be dealt with under the mineral clauses of the Act. On the contrary, it is taken out of the provisions of the mineral clauses, and is made the subject of a special agreement under the special clauses. Now what was the meaning of that special agreement? It appears to me to have been that the railway company were to purchase, if they chose, certain stone from the owner of the quarry; that is, whatever portion of the stone they did not permit him to work they were to be held as purchasers of, and to pay the price of it. That price was not to be paid until the owner of the quarry had worked up to the point at which the railway company required him to stop. I do not agree with my noble and learned friend who last spoke as to the meaning or purpose of that arrangement. It appears to me that the owner of the quarry might at any time after the passing of the Act have called on the promoters of the railway to mark the line at which they would require him to stop; and I do not see that there could have been any difficulty in ascertaining the amount and value of the stone at any time. It was not stone developed that had to be valued, it was stone that had not yet been worked or opened up. There is a certain breadth of ground under which stone is supposed to be. There must be some mode of ascertaining what is the amount of stone in the ground undeveloped, and that could be ascertained at any period. But I think that the reason of the provision as to the payment being delayed until a certain amount of the quarry was worked out was this, that until the owner of the quarry had worked up to that point he had lost nothing whatever by the company requiring him not to work the stone under that land, because he had not arrived at a point at which he could have made that stone available. And therefore it was that he was to receive no payment of the price of the stone till

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matters had arrived at a position in which he could make that stone available but for his being stopped by the railway company from doing so. It does not follow that the right to the stone was to be held as a thing to be dealt with entirely and in all respects as an ordinary matter of compensation, either under the *Railways Clauses Consolidation (Scotland) Act*, 1845, or under the *Lands Clauses Consolidation (Scotland) Act*, 1845. The manner of ascertaining the value is, no doubt, to be by a Sheriff's jury. They are to ascertain the quantity and the quality and, by inference, the value of the stone, but that is all.

It appears that the period at which the owner of the quarry was entitled to payment of the value of the stone was in the year 1852. But the value was not ascertained at that date. It was not ascertained till 1864. In any ordinary case, or, perhaps, even in this case, and looking to the terms of this clause, I doubt very much whether, even if there had been *mora* on the part of the railway company, it would have been within the province of the jury to have found specifically that interest was due on that sum. If they had put a special clause into their verdict, finding that the quarry-owner was entitled to £5272 as value, and separately, so much for interest from 1852, I doubt whether that would have been a competent proceeding on the part of the jury, in so far as regarded the matter of interest. For all that was remitted to them under this statute was to ascertain the quantity and quality, and, by inference, the value of the stone; and if they had found that which they were not competent to find, I agree with my noble and learned friend who spoke last that a remedy might have been open to the railway company by reduction to get the better of that verdict. But that is not the question here. The question here is, whether this clause in the verdict finding the value of the stone as in 1852, means that the quarry-owner was entitled to his money at that date. And then the question arises whether, in point of law, anything has occurred to preclude him from getting interest on the price as at that date.

Now, how did this clause come into the verdict? My noble and learned friend who spoke first says it has been represented that it was done by the consent of the parties; but that he can find nothing of that kind in the evidence or on the record. Now I

think my noble and learned friend must have overlooked a statement in the answer of the railway company, which runs thus:—

It was of consent of both parties that the jury found the value of the stone in question as at the 31st of December, 1852. Neither the Pursuers' title to the stone, nor the question whether the Pursuers were entitled to interest of the price or value thereof from the 31st of December, 1852, was left to or determined by the jury. The claim of the Pursuers, and the tender made by the Defenders, included the principal sum or value of the stone only, and were both made leaving the question of interest open, and the verdict of the jury was returned upon the same footing.

If that was a question intentionally left open to be afterwards dealt with, and was not a question within the competency of the jury and the Sheriff, then where was it to be dealt with? The Supreme Court was the only Court that could deal with it. If it should be found that the value or price was a debt payable as at the date specified, then, on the ordinary principles of law, unless there was something to interfere with them, interest would be due from that date. The interest being a separate thing, which neither the jury nor the Sheriff could deal with, it follows that it was an open question to be dealt with by a competent tribunal.

On that footing it appears to me that the Court had jurisdiction to deal with the question of interest. Then, have they dealt with it rightly or wrongly? It does not require a special contract to make interest due, nor does it require that there be any clear *culpa* or blame on the part of the person who has not paid the price at the proper date. The Court found that neither party was to blame for the delay that took place. In the opinion of my noble and learned friend who spoke last the owner of the quarry was alone to blame for not having the value ascertained earlier. But it is a common statement between the parties, that no blame attached to either party; and if there was no blame attaching to either party, then *mora* cannot be introduced into the question; and if *mora* is not introduced into the question, then we fall back on the ordinary rule. It was the case of a purchaser who got into possession in 1852, and to whom, through no fault of the seller, the price was not fixed till 1864. That being so, I incline to concur in the judgment which the Court below pronounced upon that point.

Then, as to the question of expenses, if the value of the stone was ascertained at a less sum than the amount which was ten-

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dered, I think the expenses of the trial ought to be borne in the way ruled by the Sheriff. But it is not clear to me that the tender was intended to apply to the mere value or price of the stone as at 1852. As regards the expenses in this cause, as well as on the two points of jurisdiction and liability for interest, I go with the Court below.

Interlocutors reversed.

Solicitors for the Appellants: *Grahames & Wardlaw.*
Solicitors for the Respondents: *Loch & Maclaurin.*

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June 30.

THE EARL OF ZETLAND. . . . . APPELLANT;

THE GLOVER INCORPORATION OF PERTH, *et al.* . . . . . } RESPONDENTS (1).

River Fishings—Rights of Opposite Proprietors.

Where independent proprietors on the opposite banks of a river have rights respectively of fishing in the stream, each is entitled to fish from the bank of each, *usque ad medium filum.*

Case of a Shifting Island in the Channel.

If a shifting island springs up in the channel so as to impede or embarrass the fishings of one of the proprietors, he must submit, and hope for a change. The law can give him no redress. But if the shifting island becomes fixedly annexed to, and incorporated with, his bank, the permanent accretion will give rise to a new *medium filum.*

Salmon Fishing—Base Right.

Where a base right to salmon fishing has been followed by forty years' possession and enjoyment it is unimpeachable.

Resignation of a Base Right.

Per LORD WESTBURY:—A thing surrendered by English law, so as to produce merger, is lost and destroyed; but a thing resigned by Scotch law is not lost, but simply surrendered to the superior.

THE above parties are opposite proprietors on the banks of the *Tay*, in *Perthshire;* the Earl of *Zetland's* estate being on the south, and the Respondent's on the north, side of the river, which there, at high water, is about a mile and a half wide.

(1) Reported 3rd Series, vol. vi. p. 292, and *Scottish Jurist*, vol. xl. p. 162.

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The question was as to the right of fishing for salmon, the usage having been in accordance with the rule that each of the opposite proprietors should fish from his own bank to the *medium filum*.

But a singular difficulty arose in this case: An island, called "*Eppie's Taes*," having sprung up so far back as 1809, and gradually increased from the operation of currents, tides, and floods—the development constantly extending in magnitude, and varying in shape and position, but at last resting almost wholly on Lord *Zetland's* portion of the river. This shifting island, represented as extending to twenty acres, though only visible at low water, proved an impediment or an embarrassment to his Lordship's fishings, which were let at £600 a year.

To have the island declared a consolidated part of Lord *Zetland's* bank, so as that the measurement *ad medium filum* should be calculated from the island, and not from the bank itself, was, in effect, and substantially, the object of the present suit, which was commenced by his Lordship in 1865.

Lord *Zetland's* main argument was, that *Eppie's Taes* had become, and was "now, truly a part of the southern bank or shore," the real body or channel of the river being entirely on the north side of the island; the water on the south side of it being, as the pleadings alleged, "a mere tidal gut." And one of the witnesses, a civil engineer, gave his opinion that the stream "on the north side of the island was the only proper channel."

The title of Lord *Zetland* was established by a Crown charter *cum piscariis*, and by an uninterrupted exercise of the right for more than forty years. But though by his summons he did not challenge the Respondent's title, he in his pleadings insisted that by reason of a consolidation of the *dominium utile* with the *dominium directum* the title of the Respondent, a base one, had, under the circumstances, been destroyed.

The Lord Ordinary (1) found that both parties were entitled to fish for salmon *ex adverso* of their respective lands, and that the right of each extended from the bank of each to the *medium filum*. He also found that *Eppie's Taes* must be dealt with as merely a portion of the bed of the river, "and incapable, in its then state, of permanent appropriation."

(1) Lord *Jerviswoode*.

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Against this judgment Lord *Zetland* reclaimed to the Inner House, who adhered to the Lord Ordinary's interlocutor; declaring, however, that their judgment was to be considered "as applicable only to the existing state of the *alveus*." Lord *Zetland*, under these circumstances, appealed to the House.

The *Lord Advocate* (1), and Sir *Roundell Palmer*, Q.C., were heard for the Appellant.

Mr. *Mellish*, Q.C., and Mr. *Wotherspoon*, for the Respondents, were not called upon to address the House, which gave judgment at once.

The following were the opinions of the Law Peers:—

THE LORD CHANCELLOR (2):—

My Lords, the Appellant's complaint is, in the first place, that it ought not to have been found that any right whatever existed in the Defenders with reference to this fishery. And, secondly, that, regard being had to the special circumstances of this case, the sort of island that is known by the name of "*Eppie's Taes*" is so formed that, in reality, it should not be treated as being a part of the bed of the river at all, but as a part of the southern bank; and that the measurement of the *medium filum* should be taken, not from the northern edge of the southern bank, but from the northern edge of this shifting island; or, at any rate, even if it be not considered as forming a part of the actual southern bank, yet that, according to the decision, or rather the *dicta*, in *Wedderburn* v. *Paterson* (3), the Appellant should be allowed to measure the *medium filum* not from the fixed southern bank, but from the northern edge of the island.

The question as to the effect of the consolidation which took place in the Respondents' feudal title seems to have been very little discussed in the Court below; and therefore I may well feel doubt and hesitation as to any conclusion which I might come to with such little assistance as is to be derived from anything said in the Court below, or anything in the way of authority in the argu-

(1) Mr. *Young*, Q.C. (2) Lord *Hatherley*.
(3) 2 McP. 902; *Scottish Jurist*, vol. xxxvi., p. 452.

ments which took place before us. There are expressions in certain Scottish text-writers comparing the effect of consolidation with the effect of a merger. But, as far as I have been able to inform myself upon the subject, a consolidation has not the effect of destroying the right of fishery which was surrendered in order to be consolidated with the superiority; for it seems to be conformable to Scottish law that consolidation has not the effect which, according to English law, would arise in the case of merger.

Now, as regards the facts, there really seems to be no reason for finding fault with the conclusions which have been come to in the Court below. Under these circumstances, the question of fact appears to be with the Respondents, as well as the question of law, and the only result which I can come to is, that the appeal must be dismissed with costs.

LORD CHELMSFORD:—

I understand by the terms of the summons, and also by those of the plea in law, that the general right of the Respondents to the fishing is not denied, but merely their right to fish on the southern side of the *medium filum*. It is true that in the Respondents' statement of facts they set out a statement of their title to the fishings, and the Appellant "denies that in virtue of said titles the Defenders have *any* right to salmon fishings." But I should have thought this would be insufficient to put the Respondents' titles in issue, as by the *Scotch Judicature Act*, 6 Geo. 4, c. 120, s. 11—

> The pleas stated on the record, and authenticated by the signature of the Lord Ordinary, shall be held as the sole grounds of action or of defence in point of law, and to which the future arguments of the parties shall be confined.

Nor can I think that the argument of the Appellant as to the effect of the consolidation of the *dominium utile* and the *dominium directum* could have been addressed to the Court of Session, or, at all events, have been strongly dwelt upon, or it could not have failed to be noticed, particularly by Lord *Curriehill*. I must therefore conclude as to this question (if it could be raised at all) in the words of that learned Judge, "that the Respondents have produced a title which conveys to them a right of salmon fishing, which has been followed by possession."

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With respect to the question as to *Eppie's Taes*, I am satisfied with the opinion of the Lord Ordinary, who says that—

> It cannot be dealt with as if it were an island in the bed of the stream, capable of permanent occupation by either party, or as now truly a part of the southern bank or shore, but it must be regarded as a temporary obstruction in that bed, and, in consequence, the rights of the Pursuer and Defenders must be regulated in respect to the mode of fishing from it, so as most nearly to preserve to them their common-law right to fish respectively to the *medium filum* of the stream.

It appears to me, my Lords, that this case is within that of *Wedderburn* v. *Paterson* (1), in which it was held that a sandbank having been formed in a tidal river, which at low water divided the river into two streams (in that case into equal streams), a line drawn down the middle of the river at low water, taking the two channels together, was to be regarded as the limits of their respective rights.

Upon these short grounds, I think the interlocutors ought to be affirmed.

LORD WESTBURY:—

It was said, and said rightly, that possession must be applied to the title; but it was alleged confidently that the only title that here existed was destroyed. Now that proceeded on the application to Scotch law of an English notion, that when an instrument of resignation was executed the resignation had the effect of merging and destroying the thing resigned. Reference was made to Mr. *Ross*' lectures (2), in which, probably not thoroughly understanding our doctrine, he compared a resignation to merger. Now, the difference is this—a thing surrendered by English law, so as to produce a merger, is lost and destroyed. A thing resigned in Scotch law *ad perpetuam remanentiam*, if it be a subject in which the *dominium utile* has been granted, is restored to the superior. It is again conjoined with the thing from which it was taken, as an integral part thereof, to remain conjoined with it for ever. In English law if a freeholder has granted a lease retaining the reversion, or if he sells and conveys the reversion to another, and then the lessee or the assignee of the term surrenders it, the term is lost, and the reversion becomes the estate in possession. But if

(1) 2 McP. 902; *Scottish Jurist*, vol. xxxvi. p. 452. (2) Page 222.

the *dominium utile* in a particular subject has been granted by the superior, and then there is a resignation of the thing granted, the resignation is restitution, not for the purpose of destruction, but for the purpose of enjoyment.

Now, all this is abundantly well known to those who are familiar with Scotch law, and it is evidenced by the very language of the instrument of resignation *ad remanentiam* as set out by the Appellant. There the resignation is made

> Into the hands of the said *James Hunter*, immediate lawful superior thereof, in favour of himself, his heirs, successors, and assignees *ad perpetuam remanentiam*, to the effect that the right of property thereof may return, and be conjoined, consolidated, annexed, and incorporated with the right of the same standing and established in his person in all time coming.

Lord *Curriehill* says that the Respondents "have produced a title conveying to them a right of salmon fishing, which has been followed by possession."

That right passed with the grant of the superiority which was subsequently made, and followed by possession. The only title they produced was the grant of that superiority by *Hunter*, after *Hunter* had consolidated with it the right of salmon fishing, which had been previously granted to *Duncan*, and was then held as part of the *dominium utile* belonging to the *dominium directum* of that superiority. That being the state of the case, there can be no doubt that the principal argument of the Appellant fails altogether in point of law.

The question that then arises is one of difficulty and novelty. If the Appellant had been in a condition to prove that this island, which appears for years to have been shifting, had for a considerable period of time been so annexed to his bank of the river as to become a permanent accretion, or a constant fixture thereto, and thereby to have diminished permanently the width of the *alveus*, then I should have been of opinion that the Appellant had a right to have the *alveus* of the river measured from the north side of this permanent accretion; but the facts only amount to this—that the bank has shifted, and that now it is in closer proximity than formerly to the bank of the Appellant, and is between the north aspect of that bank and the *medium filum* of the old *alveus* of the river. It is not even averred by the Appellant to

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have become permanently annexed to his shore. It is averred only that it lies opposite, and that there is a channel between it and the bank of the Appellant, and that through that channel, even at low water, the water of the river runs, and at high water the bank altogether disappears, and the depth of water over the bank is sufficient for the passage of boats, and also for the exercise of fishing. Also the right of fishing is prosecuted by the Appellant at low water in the channel between the innermost side of the floating bank and the shore of the Appellant.

On these grounds it is impossible to affirm that the shifting island has become a permanent accretion, and it is impossible to bring it within the illustration given by the learned Judge in *Wedderburn* v. *Paterson* (1), where he puts the possible case of a bank adhering at one extremity to the shore of a proprietor's fishing-place, and fixing itself in such a manner as to constitute between its inner side and the old shore of the river a sort of *cul-de-sac*, through which the water would not flow. If by possibility such a case could occur, the result would be, that for all practical and useful purposes so much of the former *alveus* of the river would be annihilated, and the proprietor at that particular part of the river might be entitled to have, as it were, a new measurement of the *alveus*. Without discussing that, which is nothing in the world more than a species of *obiter dictum* of the learned Judge, and without giving any opinion on that point, which is wholly new, as far as I am aware, and wholly unsupported by any other decision, it is sufficient to say that the facts of this case do not bring it into anything like the condition which is supposed in the *dictum* I have alluded to.

On the whole, therefore, although it is probable that from time to time a great advantage is gained by the Respondents, and some prejudice sustained by the Appellant, it is impossible to make the temporary state of things which we now find to exist the grounds on which to found an adjudication; for what exists to-day may be altered by the next winter flood in the *Tay* river, and the bank may be altogether swept away, or removed to another locality. On these grounds, my Lords, both of law and of fact, I concur in the advice which has been given to your Lordships to dismiss this appeal.

(1) 2 McP. 902; *Scottish Jurist*, vol. xxxvi. p. 452.

LORD COLONSAY:—

The general principle of consolidation and the meaning of resignation are substantially what was stated by my noble and learned friend who spoke last. The argument stated in the case for the Respondents put forward in the Court below, was this—that by the resignation of the fishings "*James Hunter*" (the Respondent) "had lost the right to them altogether, because it was said there could be no effectual consolidation, seeing that, *ex facie* of his titles, *James Hunter* was not superior in the salmon fishings." Now, the argument maintained here was, that he had lost his right to the fishing because of the resignation. I do not understand how consolidation could deprive him of the right of fishing which he had acquired. I think it would be a very extraordinary doctrine to hold, that by resigning that right in his own favour he had lost it, unless there had been a new infeftment or feudalizing. I do not think that that is a sound doctrine. Then, again, it has been said that he had not the right of superiority. If that were so I do not see how he could effectually resign into his own hands, or that there was any resignation at all.

As to the question of fact, there is a principle for the solution of it. The general rule is, that each party is entitled to fish to the centre of the stream. I think that here so long as the bank is in the position in which it is admitted by the parties to be, we cannot alter the termini from which we are to measure where the *medium filum* is. I am glad to observe at the same time that while matters stand in this position it does not appear that the fishings of the Appellant have been damaged by it; on the contrary, so far as the evidence goes, it rather appears that the effect of it has been rather to deepen the water on his—the southern—side of the stream, and to give him a greater amount of fishing than he had before. However, that is his good fortune. I think the judgment of the Court below ought to be affirmed.

Interlocutors affirmed; and appeal dismissed, with costs.

Solicitors for the Appellant: *Loch & Maclaurin.*
Solicitors for the Respondents: *Stibbard & Beck.*

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June 30.

CITY OF GLASGOW UNION RAILWAY COMPANY . . . . . } APPELLANTS;
HUNTER . . . . . RESPONDENT (1).

Compensation under the Railway Statutes.

5 H.L. 425. 426, 447, 458, 464

No claim can be made in respect of a damage for which the claimant would not have had an action supposing the Railway Act had never been passed.

The damage must be done by the construction of the works; and not afterwards, when the works have been completed.

Noise and Smoke of Trains.

4 P.C. (N.S.) 7 15 L.J. 378 9 B.D. 743

Held (reversing the judgment appealed from), that statutory compensation cannot be claimed by reason of the noise or smoke of trains, whether part of the claimant's lands be taken or not.

Per THE LORD CHANCELLOR:—Anticipated damage from the noise and smoke of trains does not appear to be a proper subject of estimate for compensation under the railway statutes.

Per LORD CHELMSFORD:—The Legislature having given the promoters no power to annoy the occupiers of neighbouring property with smoke,—an injury from this cause is not the subject of compensation, but a ground of action. A man may have a right of action and a right of indictment where he cannot claim statutory compensation.

MR. *HUNTER* had property in *Glasgow*, part of which fronted *Eglinton Street*, and part *Eglinton Place*. On the part fronting *Eglinton Street* there was a large building—the ground floor consisting of shops, the upper floors of dwelling-houses. Behind this was the back ground fronting *Eglinton Place*, on which there were some outbuildings. This back portion of Mr. *Hunter's* property was demanded by the above company for the purposes of their railway, and they served him with the usual statutory notices. They also built a bridge across *Eglinton Street* close to his front tenement. The question of compensation was tried before the Sheriff and a jury. The jury returned a verdict, finding Mr. *Hunter* entitled to £758 for the property to be taken; and they also found him entitled to compensation for the "noise and smoke" of the company's trains, although the line was then unfinished, and no trains

(1) Reported 3rd Series, Scotch Cases, vol. vii. p. 408; and *Scottish Jurist*, vol. xli. p. 229.

had yet passed along it. The clause of the verdict as to "noise and smoke" contained other articles, and was thus expressed:

For damage to Mr. *Hunter's* remaining property caused by the *noise of trains*, railway bridge across the street, *smoke*, and general nuisance, and deterioration of the tenement next the railway, £392.

The Sheriff gave judgment in conformity with the verdict; and thereupon the company brought an action in the Court of Session to have both the verdict and the judgment of the Sheriff reduced and set aside.

The Lord Ordinary repelled the reasons of reduction, and gave judgment in favour of Mr. *Hunter;* and the Inner House (First Division) adhered, with costs. In other words, both the Lord Ordinary and the Inner House decided that the jury and the Sheriff were right in awarding to Mr. *Hunter* damages against the company for "the noise and smoke of their trains." The company appealed to the House.

Sir *Roundell Palmer*, Q.C., and Mr. *Lloyd*, Q.C., were of counsel for the Appellants.

The *Lord Advocate* (1), Mr. *Mellish*, Q.C., and Mr. *Macdonald*, for the Respondent.

THE LORD CHANCELLOR (2), after stating the pleadings and the question raised, proceeded as follows:—

I take the result of the decisions in *Ricket's Case* (3), and in *Brand's Case* (4) to come to this. In the first place, no claim of statutory compensation can be made in respect of a damage for which the claimant would not have had an action supposing the Railway Act had never been passed. That is one point that has been settled. The second point was settled by this House in *Brand's Case*, and it was this,—that the damage must be damage done in the execution of the works, and not damage done afterwards when the railway is completed, and in the exercise of the powers vested in the company by the general Acts, the *Railways Clauses Acts*, and their special Act.

(1) Mr. *Young*, Q.C.
(2) Lord *Hatherley*.
(3) *Ricket* v. *Metropolitan Railway Company*, Law Rep. 2 H. L. 175.
(4) *Hammersmith Railway Company* v. *Brand*, Law Rep. 4 H. L. 171.

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There is no ground for supposing that the Legislature intended to give compensation for any further or other injury than that occasioned by the operation of the *Railways Clauses Act*, and the works authorized by the special Act; or that they intended in any way to extend the remedy to the exercise of the powers of the Act after the works had been executed. There is no reason *à priori* to suppose that any such intention could be anticipated in an Act which simply deals with the proprietary rights of the landowner, and the mode of ascertaining his rights. I think we are bound to read those words, "the exercise of the powers of the Act," exactly as they were read in *Brand's Case* (1), as meaning that no further compensation was intended to be given than for that damage which might be occasioned by the execution of the works.

That being so, we find that in the damages awarded by the jury to Mr. *Hunter* there is included injury by noise of trains and smoke. Now the noise of trains and smoke would clearly fall within the principle of *Brand's Case* (1), and the parties would not be entitled to any assessment in respect thereof.

The question as to whether or not the injury done to the party's property was an injury for which he might have had an action if the Act had not been passed, is a question that hardly arises as regards the specific damages which are here averred, because they do not arise in any way by virtue of the execution of the works, and the party does not, therefore, come under the head of being "injuriously affected by the exercise of the powers contained in the special Act."

Anticipated damages for noise of trains and for smoke, which may accrue hereafter, do not appear to be the proper subjects of an estimate for compensation before they happen. They might very well be the proper subjects of an interdict when they were happening or were expected to happen. But as they are matters which may or may not be continued for a longer or for a shorter time, one does not see how it can be right and proper that this compensation should be given for those anticipated evils, the character of which cannot be fully or fairly ascertained beforehand. As regards damage actually done, as in the *Stockport Railway Case*, which came before Mr. Justice *Crompton* (2), one understands how

(1) Law Rep. 4 H. L. 171. (2) 33 L. J. (Q.B.) 251.

that point may be put. But it seems to me enough here to say that, consistently with *Brand's Case* (1), this verdict cannot be sustained. Nor do I think it necessary to pursue the inquiry which was raised by the Lord Advocate, namely, whether or not the case was not distinguishable according to the principles of the *Stockport Railway Case* (2) by this circumstance, that the owner here might have had an action against the company if the Act had not passed; not, indeed, an account of the particular things here mentioned, but because the particular evils here referred to could not have been achieved without a trespass upon his property which would at once have given him a right of action. I confess that seems to me rather a subtle reasoning upon the subject, but I do not think it touches the principle determined in *Brand's Case* (1), namely, that the matters here included in the verdict were matters not occasioned by the execution of the works.

LORD CHELMSFORD:—

The learned counsel for the Respondent admitted (as they were compelled to do) that this case must be governed by your Lordships' judgment in the case of *Brand* (1) unless they could distinguish the two cases. The distinction which they relied upon was, that in the case decided by this House no part of the land of the party claiming compensation was taken by the company, whereas here a portion of the Respondent's land was acquired and used for the purpose of the railway. This, they contended, brought them within the principle of the decision of Mr. Justice *Crompton* in *Re Stockport Railway Company* (2). It is to be observed that the Court of Session were not called upon to consider whether this distinction was well founded or not, as when the case was before them, the appeal in the case of *Brand* had not been heard; and, as the question then stood, the decisions were favourable to the Respondent.

Even if the *Stockport Railway Case* (2) should be taken to have been rightly decided, it is distinguishable from the present in an important particular which appears to me to prevent its application.

The head of claim which was questioned in the *Stockport Rail-*

(1) Law Rep. 4 H. L. 171. (2) 33 L. J. (Q.B) 251.

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way Case was founded upon a probable injury to the premises (consisting of a cotton mill) by reason of the risk of fire in consequence of the proximity of the railway. This danger would, of course, be occasioned, not by the construction of the railway itself, but by sparks emitted from the locomotives in the course of running the trains over that part of the line. Mr. Justice *Crompton* said:—

> Where the mischief is caused by what is done on the land taken, the party seeking compensation has a right to say it is by the Act of Parliament, and the Act of Parliament only, that you have done the acts which have caused the damage.

If I had to express an opinion upon the correctness of this decision, I should be disposed to say with Baron *Bramwell* in the case of *The Duke of Buccleuch* v. *The Metropolitan Board of Works* (1).

5 H.L. 426

> It does seem strange that the taking of a piece of a man's land should let him in to prove all sorts of damage for which he could not otherwise recover.

But the claim in the present case does not arise out of anything done on the land taken, nor in respect of any property of the Respondent connected with the land so taken, but from the construction of a railway bridge over the land of another person, no connection existing between the front part of the Respondent's premises, in respect of which compensation for damage has been given, and the back part, over a small portion of which the railway is made. These different parts of the Respondent's property are not otherwise connected than by their both being held under one title.

This, however, according to the argument of the learned counsel for the Respondent, is sufficient to let in every description of claim for compensation for anything which deteriorates the value of any part of the property. Mr. *Mellish* went the length of arguing that the Respondent was entitled to whatever amount of compensation a willing vendor would require from a purchaser of part of his land for any injury which might accrue to the rest of his property. But a willing vendor may make his own terms with a purchaser, and what he can do of his own unfettered will can be no criterion of what he is entitled to claim under an Act of Parliament which

(1) Law Rep. 3 Ex. 328.

compels him to part with his land, and at the same time limits and defines the nature and extent of the compensation which he is to receive.

As no part of the Respondent's property has been injured by anything done on his land over which the railway runs, his right to compensation for damage appears to me to be precisely the same as if none of his land had been taken by the company. The case of *Brand* therefore, conclusively establishes that the claim for compensation "for damage caused by noise of trains and smoke," ought not to have been entertained by the jury. If there was an obstruction of light and air to the premises caused by the neighbourhood of the bridge, it would have been an injury which would have entitled him to compensation. But assuming that there was a right to compensation under this head of claim, it is so undistinguishably mixed up with other matters not within the competency of the jury, that, according to the case of the *Caledonian Railway Company* v. *Ogilvy* (1), the verdict in this respect cannot be maintained.

Besides relying upon the distinction between this case and that of *Brand*, the learned counsel for the Respondent argued that the clauses of the Scotch Acts, which are applicable to this case, are open to considerations different from those upon which the decision of the House in *Brand's Case* (2) turned.

If the *Railways Clauses (Scotland) Act* is to govern the present case, then it is impossible to distinguish the two cases; for the sections 6 and 16 of the Scotch Act are identical with the sections 6 and 16 of the English Act, upon which *Brand's Case* (2) was decided.

But it is argued for the Respondent, that as some of his land is taken by the company the *Lands Clauses (Scotland) Act*, and not the *Railways Clauses (Scotland) Act*, must be referred to in order to determine his right to compensation. I have already expressed my opinion that as the damage for which he claims is not caused by anything done upon the land taken, his case must be dealt with as if no part of his land had been used for the railway. But I will consider his claim with reference to the *Lands Clauses Act*.

The two sections of that Act which were principally referred

(1) 2 Macq. 229. (2) Law Rep. 4 H. L. 171.

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to are the 17th and 48th. The 17th section directs that the promoters of an undertaking requiring to purchase any lands shall give notice to all persons interested in such lands that they are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works.

It seems to me that it would be a very forced construction of the words "by reason of the execution of the works" to extend them to damage caused by the use of the railway. Every such damage may, in a certain sense, be said to have been sustained by reason of the execution of the works, as it could not have happened if the railway had not been made. But the reasonable interpretation of the words appears to me to confine them to damage occasioned by the works themselves, whether directly or consequentially, and not by any after-use of them.

The 48th section relates to the proceedings before the jury summoned to assess the compensation to the owners of lands for the value of the lands, and for the damage sustained by them. It merely prescribes the mode in which the verdict is to be delivered, and does not enlarge or alter the extent or nature of the compensation to which the owner of the lands taken for the railway, or injuriously affected by it, is entitled. It directs that where the inquiry before a jury shall relate to the value of lands to be purchased, and also compensation claimed for injury done, or to be done, to the lands held therewith, the jury shall deliver their verdict—

> Separately for the sum to be paid for the purchase of the lands, and for the sum to be paid by way of compensation for the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special Act or any Act incorporated therewith.

Even if this section, by the words "injury done, or to be done," gives a right to claim compensation for damage caused by the use of the railway (which, for the reason already given, I think it cannot), it would not be applicable to this case, as the injury for which compensation is to be made must be done to lands held with the lands purchased by the railway. That cannot mean lands held under the same title, but such as are afterwards mentioned in this

section, viz., lands severed from the lands purchased and injuriously affected by the exercise of the powers of the Act. These words, "exercise of the powers of the Act," appear to me to have the same meaning as the words "execution of the works" in the 17th section; and neither of them appear to me to confer a right to recover for damage which arises (if at all), not from the works of the railway, but from its use afterwards. The verdict of the jury, therefore, with respect to the noise of trains, and smoke, cannot be supported.

It was pointed out, in the course of the argument for the Appellant, that it was not competent to the jury to make the damage arising from the smoke of the engines an element of compensation, as, by the 107th section of the *Railways Clauses (Scotland) Act*, every locomotive steam-engine to be used on the railway must be constructed on the principle of consuming its own smoke. The Legislature, therefore, having given no power to the promoters to annoy the occupiers of neighbouring property with smoke, an injury from this cause is not the subject of compensation, but a ground of action.

LORD WESTBURY:—

I always approach the determination of these cases with reluctance; but, although on a technical ground I concur with my noble and learned friends, yet in justice to what I have already said, I think it right to state that I do not in the smallest degree depart from my formerly expressed opinions (1).

I take it that the decisions have introduced into this subject two vicious and erroneous conclusions. The first, by my Lord *Campbell* (2), where he decided that the words "injuriously affected" would have no operation, except that they gave a remedy for such particular injury only as could have been actionable before the company had acquired their statutory powers. I have already stated at length (1) the conclusion I have arrived at on the statute, that, taking it altogether, the word "injuriously" did not mean "wrongfully" in the sense of "illegally," but that

(1) See *Ricket* v. *Metropolitan Railway Company*, Law Rep. 2 H. L. 175.

(2) *Penny* v. *South Eastern Railway Company*, 7 E. & B. 660.

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it meant only "prejudicially" (1). To that conclusion I still adhere.

Another vice or error was introduced, I think, when it was decided that the particular loss sustained by the inhabitants of a house, in respect of things done by the company, which did not touch the house, but most materially affected the comfort of the inhabitants thereof and their enjoyment of the property, was not an injury to property. I think that ruling was highly erroneous, for the test undoubtedly is this: Does the thing done detract from the marketable value of the premises? If the inhabitants of the house are exposed to perpetual inconvenience, that inconvenience diminishes most sensibly the value of the premises, and in that sense it is an injury done to the premises, and a deterioration of the value thereof. I lament again that in *Brand's Case* (2) the word "construction," which occurs in the introductory heading of the clause, was confined to the execution of the works. I could not have concurred in that view. It seems to me to have had the effect of depriving parties of compensation for clear injury to which they were most justly entitled.

With these limitations, I agree that what is the result of the legitimate user of the railway cannot be made the subject of a claim of compensation after the railway has been made. Whatever is done by the company in pursuance of their powers, and done in a proper manner, is a legitimate consequence of the statutory enactments, and must not be considered as an injury to any one.

With these general limitations, let us see what is the effect of the decisions upon this particular verdict. I concur with the Respondent's counsel, that where a part only of certain premises is taken, the residue being left to the owner, all the inconvenience sustained by the owner of the residue in consequence of the user made by the railway company of that which is taken is a legitimate subject of consideration when a jury is directed to address itself to valuing the property so taken; and is also a legitimate subject of consideration when a jury is directed to consider what is the damage resulting from the severance of that property. Because in estimating the damage done by severance, that is, the loss that will be sustained by the owner of that which is left, by the use

(1) The Lord President said the word injuriously was used "in a popular sense as meaning *deteriorated in value*." (2) Law Rep. 4 H. L. 171.

intended to be made of that which is taken, the manner in which that use will bear on the occupation and enjoyment of that which is left may be most legitimately considered. The technical difficulty I have is this, that in the form in which the jury have given their verdict, they have given one entire sum for a variety of things, as if they were *per se* separately legitimate subjects of claim, whereas they were not entitled to consider them *separatim et per se*, as lawful subjects of claim; but they were entitled to consider them only in connection with the other two subjects of their inquiry, namely the value of the property taken, and the loss sustained by that portion of the property which is left by reason of the severance from it, and the use, of that which is taken. The difficulty, therefore, that I find is, that the jury have attributed one entire sum to a number of grounds which cannot, in my opinion, be made separately the subject of distinct claims. I find here that £392 is attributed to damage to the Pursuer's remaining property caused by "the noise of trains." That, of necessity, must be something occurring after the completion of the railway, and attendant on the user of the railway, but which, in that individual form, could not be regarded as a head of damage for which compensation could be claimed. The article of "railway bridge across the street" is left in a very indefinite form. Whether it was brought forward as a head of injury by reason of the obstruction of the lights of the house and shop that were left in the possession of Mr. *Hunter*, or whether it was on some other ground, I cannot say. If it was the obstruction of light and air, I should say, undoubtedly, it was a legitimate head of claim. Then again "smoke." In what way that is to bear it is impossible to ascertain. Then, "general nuisances and deterioration of the tenement," are still more indefinite and uncertain. If I could agree with the Lord President that this accumulation of words means only in law damage by severance, I should say that we could not quarrel with it, or enter into any analysis of it, or set aside any part of it. But I cannot agree with him that that is the effect of this specific enumeration. I find, therefore, a sum of money attributed to a number of alleged causes of loss and damage, some of which may, but others cannot, be brought forward separately and distinctly as heads of compensation under these statutes.

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LORD COLONSAY:—

I feel that there is considerable difficulty upon some of the points involved in this case.

In the case of *Brand* (1) I certainly did rest my judgment somewhat, and not a little, upon this circumstance, that I did not think that the claimant in that case was entitled to the position of a person claiming under the *Lands Clauses Act*, because that Act has reference only to parties who claim a right of property in, or an interest in, property taken. If you look through all the clauses of the Act you will find, I think, that Mrs. *Brand* was not in that predicament. Then it appeared to me that the clauses of the *Railways Clauses Act* did not support the claim for compensation which was made. I concur, therefore, in the opinion that in the view upon which the judgment in that case proceeded, this party was not entitled to compensation for mere noise and smoke. And other cases go to that. But in regard to the destruction of light, I think that the part of the property which has been taken may be considered as a separate tenement from the part that is left, and that the owner may have been entitled to compensation as being injuriously affected in that respect. I therefore think that we ought not to preclude him from still having redress for that particular injury, in so far as the forms of procedure may admit, either in the present or some other action.

I have had considerable doubt in regard to the remaining part of the item, the "general nuisance and deterioration of the tenement," as to whether that might or might not comprehend matters for compensation, or in respect of which compensation can competently be claimed. But, in the vague way in which it is here expressed, I cannot hold that we can sustain it. It is too general, and not very intelligible in itself. Therefore I concur in the judgment proposed—altering the interlocutor of the Court of Session as regards the last item of £392, but reserving any right the Respondent may have to claim for injury done by the railway bridge.

THE LORD CHANCELLOR:—

I propose that the interlocutors be varied by finding that the verdict of the jury, so far as it awards £392 for "damage to Re-

(1) Law Rep. 4 H. L. 171.

spondent's remaining property caused by noise of trains, railway bridge across the street, smoke, and general nuisance, and deterioration of the tenement next the railway,"—is *ultrà vires* and inept; but without prejudice to such claims as the Respondent may be advised to make in respect of damage done to his remaining property by the railway bridge from obstruction of light and air.

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Agreed to, and Cause remitted to the Court of Session to proceed accordingly.

Solicitors for the Appellants: *Martin & Leslie.*
Solicitor for the Respondent: *W. Robertson.*

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THE REV. R. SMITH, *et al.* . . . . . RESPONDENTS.

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SKENE . . . . . APPELLANT;
SMITH AND ANOTHER . . . . . RESPONDENTS.

PATON . . . . . APPELLANT;
SMITH, *et al.* . . . . . RESPONDENTS.

Teinds (1)—*Valuation binding, though Minister not cited.*

Held by the House (reversing the decree below), that certain valuations of teinds in 1683, 1684, 1690, and 1697, though made in the absence of the ministers affected, were binding on their representatives in the present day, and barred their suit for augmentation of stipend.

Where the interest of the ministers, not cited, was identical with the interest of the titulars who were parties to the proceedings (the interest of the titulars being the higher of the two), and where, moreover, there was no suggestion of collusion or unfairness,—valuations made in the seventeenth century, which have stood ever since, and been acted upon, must now have full effect.

High Commissioners' Ordinance of 1634.

This ordinance, declaring it "unnecessary to summon the minister to a valuation," *held* sufficiently proved, and relied upon by the House as genuine —though rejected by the Court below (Lord *Curriehill, diss*).

THE question involved in these causes was, whether certain valuations of teinds, made in 1683, 1684, 1690, and 1697, by

(1) Tithes.

2 L 2

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High Commissioners under Parliamentary authority, were valid and binding in the present day; it appearing that the stipendiary ministers of the parishes affected had not appeared, and had not been cited, as parties to the proceedings.

On the assumption that the valuations were ineffectual, these suits were instituted by the above Respondents for augmentation of their stipends; and the First Division of the Court of Session, acting as a Teind Court, decided in favour of the claim; the Lord Ordinary (1) holding, and the Inner House confirming his decision (Lord *Curriehill, diss.*), that the decrees of valuation produced by the above Appellants (the landowners) could not be sustained as effectual against the Respondents (the ministers), inasmuch as they had been obtained on applications to which neither the ministers nor "any one representing the cure" had been made parties.

Against this judgment the present appeals were presented.

The following Counsel appeared for the Appellants: The *Lord Advocate* (2), Sir *Roundell Palmer*, Q.C., Mr. *J. T. Anderson*, Mr. *Shiress Will*, and Mr. *Harry Smith*.

For the Respondents: The *Solicitor-General* (3), Mr. *Anderson*, Q.C., Mr. *Pearson*, Q.C., and Mr. *Asher*.

The following opinions were delivered by the Law Peers:

THE LORD CHANCELLOR (4):—

I shall assume, in each of these cases, that the stipendiary minister was not cited.

Now, my Lords, as regards the main point, we have had not only the advantage of the most able counsel arguing it before us, but we have really had so very full and able an argument on each side, if I may so express it, in the judgment of the Lord President, who took the one view, and of Lord *Curriehill*, who took the other—that I find it would be, in a great degree, mere repetition if I went into any lengthened detail upon the subject.

What was the exact position of all the parties interested in the question of the valuation of the teinds, which was desired to be

(1) Lord *Barcaple*.
(2) Mr. *Young*, Q.C.
(3) Sir *John D. Coleridge*.
(4) Lord *Hatherley*.

effected by the Acts of Parliament passed in the time of *Charles* I.? The King had a direct interest in the question, inasmuch as the Crown had an annuity arising from the teinds, and he was very desirous to have the teinds valued immediately, once for all, as between the heritors who had to pay, and the titulars who had to receive them. He was anxious that that valuation should be brought to a complete and final close; and he seems to have pressed in various ways upon the several persons upon whom the duty was cast by the Acts of Parliament that were passed, to bring this matter to a conclusion. A body of Commissioners was established by a special Act of Parliament, passed in the year 1633, consisting of men of high position in the state, and many of them eminent also for their legal knowledge, as a body which should have the power of proceeding in the fullest manner to investigate the matter, and with authority of a very high character to carry out the valuation; and with power also to appoint committees and sub-committees of their own number, to receive reports, and to examine witnesses, to take parties' oaths, and to give such further power to the said committees or sub-committees as they should think fit for the speedy finishing of the work; and with power to appoint sub-Commissioners, not being of their own number, within any parish or presbytery of the country. Their decrees were to have an effect of a very high character, for His Majesty

> Declared and ordained the acts, decreets, and ordinances of the Commissioners, and of the other persons who should be surrogate in their places by His Majesty in manner foresaid, in the whole particulars above specified, and every one of them, to have the strength, force, and authority of an Act of Parliament.

Now, we have to consider who were the several persons interested in this valuation. First, no doubt, there was the Crown, which had its annuity. But in the highest point of view, as to the extent of interest, there was the titular who was to receive the teinds, and there was the heritor who was to pay them.

The stipendiary clergy were in a different position altogether, as to interest, from that of the titulars. The titulars were those who had the right to the tithe and the drawing of the tithe, and the first right, in fact, to receive that provision. But the stipendiary's position was this: He was entitled to be paid his stipend out of the whole teinds of the parish. He was entitled, moreover, upon certain

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grounds which might be established, for all time after to have an augmentation of that stipend, if circumstances justified it. He was entitled further, and that usually took place when the augmentation was asked for, to proceed by an action of locality to have the tithes specially apportioned and assessed; and he could have it ascertained how much each heritor was to bear of the burden of stipend, especially if it was an augmented stipend. At the time the Act of Parliament passed, of course he had a fixed stipend, but subject to the possibility of having it augmented.

There was another possible position in which the stipendiary might be placed. He might be in a position where a certain part of the teinds had been assigned to him, in which case he would be to that extent a sort of *quasi*-titular. Again, if an augmentation of his stipend took place, it was decided that he might have an interest as the result of that augmentation. This augmentation might come up so nearly to the value of the whole teinds of the parish that, if any person were to proceed to obtain a valuation after his stipend had been so raised, he might have a very direct interest in the investigation, because in case a valuation should be made as between the heritor and titular, which should considerably reduce the teind which had been actually paid by the heritor up to the time of his obtaining the valuation, it might so happen that the teind would be so much reduced as to be insufficient for the whole of that augmented stipend. But, with these qualifications, the stipendiary had no direct interest at the time of this valuation. He only had a certain charge upon the whole amount, and if the whole amount was equal, or more than equal, as I apprehend it was in most cases at the time, for the payment of the charge, he would not be affected specially by anything that might take place with regard to the valuation.

And so I think the matter seems to have been regarded at a very early stage, as appears from the elaborate historical account for which we are indebted to Lord *Curriehill* (1).

The Commissioners proceeded to carry into effect the Acts of Parliament, and in doing so they appointed sub-Commissioners. It has now been decided by your Lordships' House that those sub-Commissioners were undoubtedly able to proceed in the absence of

(1) See 3rd Series, vol. vi. p. 504; *Scottish Jurist*, vol. xl., p. 260.

the stipendiary, and that effect might be given to their decisions by the Commissioners themselves. That has been settled by a decision of your Lordships' House in the case of *McNeill* v. *The Minister of Campbelton* (1). They were directed to proceed in the valuations "if both parties were present." The expression "both parties" is a strong indication that it was considered that all parties having an interest consisted of but two; and that appears somewhat more plainly where it is said that "if *neither* titular nor heritor compeared," a procurator-fiscal was to be appointed. The sub-Commissioners were instructed to proceed to a valuation, having all parties interested before them, those parties being described to be the titular and the heritor.

The reports of the sub-Commissioners had all to be approved by the Commissioners themselves, who were "directed to prosecute the valuation of the teinds according to the tenor of the sub-Commissioners' reports."

These reports, which the sub-Commissioners made without the stipendiary having been present, may be confirmed now at any time. There seems to be no definite period whatever to which the confirmation of these reports is confined.

But, my Lords, I now come to a document which would seem almost, if not quite, to conclude the whole case; but respecting which there is a difference of opinion between the Lord President and Lord *Curriehill* as to its authenticity and legal validity. It is represented as having been made in 1634; and if so made, it would have, according to the Act of 1633, the effect of a statute. It purports to bear the date of the 25th of July, 1634, and it purports also to be in these terms:

> The Lords find no necessity to summon the *minister* to a valuation or approbation except he be titular or tacksman.

Therefore the whole point is in truth decided if this important document be what it purports to be. It has found its way into the Advocate's Library in *Edinburgh*. It seems to have been regarded by Sir *John Connell* (2) as a document to which faith was to be attributed. He cites it, and cites it without disapprobation; and Lord *Curriehill* asserts that it has been acted upon.

(1) 5 Patton's Appeals, p. 244.
(2) Connell on Tithes, vol. i. p. 277; and vol. ii., p. 90.

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It is exceedingly difficult to conceive how or why a forgery of such an instrument as this should have been perpetrated, and it does not appear that anybody has taken upon himself to say as much in distinct terms, although the Lord President argues against its probable genuineness.

But I ought to notice the authorities which are most relied upon by the Lord President. He begins with an early case, the case of *Kirkbean* (1). Now in that case it appears that the minister himself made a statement that the valuation, if made in the manner then proposed, and if supported, though having been made in his absence, would bring the whole amount of the teinds below the modification of his stipend to which he was entitled, and therefore in effect he had a complete and direct interest in being present, in order to save a part of his property which would be otherwise destroyed. That of itself I think makes a very clear distinction between that case and an ordinary case in which the stipendiary simply has a species of lien or charge.

The other case, which was very much relied upon, was the case of *Lady Purvishaugh* (2), in which the minister averred that he had an assignment of the teinds. Therefore, that again was a case in which the stipendiary had a direct interest in the matter in question.

Several of the text-books seem to speak strongly as to the minister being a necessary party. But here again this arises—that in 1707 the jurisdiction was vested in the Court of Session. We can easily understand how that tribunal might well think it necessary to call before them all the persons who by any possibility whatever might have an interest in the matter in question. No doubt the stipendiary may ultimately have an interest in the valuation of each particular property; but on the other hand the former Commissioners, without violating any of the fixed principles of justice, which require that persons interested should be brought before the Court, might still decide that the stipendiaries had not that amount of interest which would make it necessary that they should be called. We have instances of the kind even in our own Courts. I remember the time when the question was much dis-

(1) *The Minister of Kirkbean*, Connell on Tithes, vol. i., p. 279.
(2) Connell on Tithes, vol. ii. p. 196.

cussed with reference to the parties to our suits in equity, as to whether parties having an interest in the nature of charge for an annuity, and the like, should be brought before the Court; and a great and legitimate difference of opinion existed upon that point where the interest was comparatively very much less than the interests of all the other parties who were concerned in the litigation.

It was said that the interest of the stipendiary was very great, and at last it was pushed in argument to this extent—that it exceeded the interest of the titular. It is possible that in consequence of some recent augmentations and other causes it may have become great; but in the instances before us, it appears that matters had gone on for nearly 200 years before the interest of the stipendiary emerged. That being the case I think it is not too much to say that the character of the stipendiary's interest was one which could reasonably, and without any disregard of the first principles of justice, be considered as sufficiently and adequately represented by the heritor.

We next come to a series of modern cases in favour of the view contended for by the present Respondents, and we have to consider how far your Lordships ought now to affirm those decisions (which have never been brought up to this House), and at this distance of time to say, that that was not rightly done which was done by high officers, who must be supposed to have been acting in the discharge of their duty, and who did not think it necessary in the discharge of that duty to give to their sub-Commissioners any directions for the attendance of the stipendiary. When we look at all these circumstances, I think we are justified in saying that the weight of reason and probability would stand very high, wholly irrespective of the Act of 1634, for the regular course of proceedings before the Commissioners having been such as that ordinance would indicate it to have been.

My Lords, I have carefully endeavoured to weigh the arguments on both sides, and I say, even if the case was not fortified by that Ordinance of 1634, I should have come to the same conclusion; but I say also that I think the balance is strongly in favour of the genuineness of that document, and if so, the case would be decided by that document alone.

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The second and third of these cases (1) now before your Lordships, seem to me to rest on principles similar to those which govern the first one; and I apprehend it will follow in each case that the objection to the valuation falls to the ground when the principle has been established that the Commissioners did not meet merely to approve the consents; but that they met to have such evidence produced before them as they should deem to be just and meet. They did not disregard consents, as being a very good mode of ascertaining the real value of the teinds, but having examined them, and looked into the circumstances, they came to the conclusion that the value was such as the consents really shewed.

I apprehend, therefore, my Lords, that we ought to reverse the interlocutors complained of.

LORD COLONSAY:—

The question here arises on a process of augmentation, modification, and locality; and, therefore, the reversal of the judgment would mean that it was to go back, to have the process disposed of in the Court below.

In my opinion, the conclusion at which my noble and learned friend has arrived is correct. I think that prior to about 1837 there is scarcely any decided case at all, I should say no decided case which goes directly to sustain the contention of the Respondents. The early case of *Purvishaugh* (2) is not, I think, a case in point, for in that case the minister of the parish was not merely a stipendiary, but had another interest in the teinds; and, accordingly, I observe that in giving judgment in the present case the Lord President throws out of view the *Purvishaugh* case, as not being one upon which he can rely.

Then, coming to the more recent cases, the next in date I think is the case of *Kirkbean* (3), in 1708, where it appears that the minister had obtained a decree of augmentation and modification of his stipend; and the attempt at a valuation then made was an attempt which would deprive him of the judgment he had already obtained,

(1) Namely, *Skene* v. *Smith*, and *Paton* v. *Smith*.

(2) Connell on Tithes, vol. ii. p. 196.

(3) Ibid. vol. i. p. 279.

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and that was held to be an interference with a substantial interest. *McNeill* v. *The Minister of Campbelton* (1), was a case of a sub-valuation, the approval of which was opposed. It was there decided in the Court below, and affirmed by this House, that the absence of the minister, whether he was not called, or whether he had not appeared after being called, did not invalidate the proceedings; that it was not necessary that he should be a party to the sub-valuation, and that the sub-Commissioners were quite entitled to go on without the presence, or knowledge, as far as judicial knowledge went, of the stipendiary. That is a very important decision, and I must say I have great difficulty in seeing any principle by which such a distinction could be drawn as that of not requiring the minister to be a party to a sub-valuation before the sub-Commissioners, and requiring him to be present at a valuation conducted by the Commissioners.

I see that in the case of *Brown* v. *Stewart*, in 1851 (2), which was not, however, the next case that occurred, but was a case of the absence of a minister at a valuation by the Commissioners, the Lord Justice Clerk *Hope*, who was one of the majority, in very strong terms, and with very great confidence, assailed the judgment of the Court below and of this House in *McNeill* v. *The Minister of Campbelton* (1). He contended very strongly and very forcibly, that there was no distinction in principle between the case of a valuation by the sub-Commissioners and the case of a valuation by the Commissioners; and while he was sustaining the objection founded upon the absence of the minister at a valuation before the Commissioners, he contended that the judgment which decided that a valuation proceeding before the sub-Commissioners could go on without the presence of the minister, was necessarily wrong in principle. But it was only wrong in principle if the view of Lord Justice Clerk *Hope* in regard to the necessity of the minister being present before the Commissioners was a right conclusion. Then we have to set the principle on which Lord Justice Clerk *Hope* worked out his judgment in the case of *Brown* v. *Stewart* (2) against the principle assumed by this House in the case of *McNeill* v. *The Minister of Campbelton* (1). I venture to lean to the judgment of this House in the case of *McNeill* v. *The Minister of*

(1) 5 Patton's Appeals, p. 244. (2) 13 Dunn, 566.

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Campbelton (1); and if that is to be the fixed point which we are to start from, I hold that the judgment delivered by Lord Justice Clerk *Hope*, who led the majority in the case of *Brown* v. *Stewart* (2) is, in principle, in favour of the judgment we are now going to pronounce; because his opinion is that there is no distinction as to the necessity for the presence of the minister, whether the valuation be before the sub-Commissioners or before the Commissioners. I think he is right in that view; but I think the conclusion it leads to is that he was wrong in the judgment he pronounced in the case of *Brown* v. *Stewart* (2). And Lord *Medwyn* was of opinion, in the case of *Brown* v. *Stewart* (2), that the presence of the Minister before the Commissioners was not necessary.

Therefore, down to 1851, there was no unanimous opinion of the Court; it was a disputed point among the Judges, and it was in that unsatisfactory state of the question that the judgment in the case of *Brown* v. *Stewart* (2) was arrived at—the Lord Justice Clerk contending that he must maintain that in principle the judgment of this House in the case of *McNeill* v. *The Minister of Campbelton* (1) was wrong. There had been a case shortly before that (the case of *Simpson* (3) in 1837), in which there had been a divided judgment too. In that case Lord *McKenzie* was of opinion, that the presence of the minister was not necessary. Therefore, since the decision in the case of *McNeill* v. *The Minister of Campbelton* (1) there have been judgments in which the Court was divided, and in the later of the two, the reasoning I have noticed of the Lord Justice Clerk leads, I think, to the opposite conclusion to that which the judgment in that case decided. Then comes the case of *Kirkwood* (4), in which the Court of Session held that the point was settled according to the view contended for by the Respondents as far as that Court was concerned; because there had been two or three successive judgments resting upon it. But it is now a settled point, not only by the case of *McNeill* v. *The Minister of Campbelton* (1), but by a case subsequent to all these, the case of *Jameson* (5), that the presence of

(1) 5 Patton's Appeals, p. 244.
(2) 13 Dunn, 566.
(3) 15 Sh. 1163.
(4) Connell on Tithes, vol. i. p. 279.
(5) *Jameson* v. *Little*, June 19, 1867; *Scottish Jurist*, vol. xxxix., p. 512. 3rd Series, vol. v. p. 914.

the minister, or his being made a party in a valuation before the sub-Commissioners, was not necessary.

I think, therefore, my Lords, that there are no authorities that can be held as at all final, or bearing the character of a series of judgments, as the Lord President held in this case.

Then, what is the principle that is to be applied? The proceedings before the Commissioners, or the sub-Commissioners, were not proceedings before a regular Court. They were proceedings before a Commission appointed for the attainment of a public object, namely, the valuation of the teinds, with a view to various results that were to follow from it—one of them being the right of purchasing tithes. They were to go on and execute their commismission, taking such evidence as they thought necessary, or as appeared reasonable in the circumstances. They required to have before them the heritor who wanted his lands valued. The titular, who was the party who had the direct and immediate interest in the teinds, was to be cited. No other parties are named. If the minister was a beneficiary, then he was in the same position as the titular. But there is no indication or mention whatever of stipendiary ministers as persons who require to be called. And there is no direct authority for saying that they were required to be called. *Forbes* (1), who writes at the very close of the last century (but who has never been considered a very accurate writer on either the general law of *Scotland*, in his two volumes of Institutes, or in his treatise on Teinds, though it was useful as being almost the only work on the subject at the time), *Forbes* says, that the minister must be called—but he does not say what minister must be called; and he refers as his authority to the case of *Purvishaugh* (2), the case which on this point is now given up as an authority. The practice was very various. Lord *Medwyn* founds upon that practice in *Brown* v. *Stewart* (3). The ministers who were stipendiaries in many cases even were not called before the High Commissioners. In that condition of a divided practice how can we say that it is a fatal objection to a valuation that the minister was not called? No doubt more recently the practice has been to call the minister—whether a stipendiary or a beneficiary—*ex majore*

(1) Forbes on Tithes. (2) Connell on Tithes, vol. ii. p. 196.
(3) 13 Dunn, 566.

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cautelâ; but the practice that has made it so universal is the practice before the Court of Session since it has become the Commission of Teinds. But at the early period when these three valuations with which we are now dealing took place, there was no uniformity of practice at all, and, indeed, if there had been, it is not likely that these three different valuations, in three different years, at the instance of different parties, would have all proceeded upon the principle that it was unnecessary to call the stipendiary minister if the practice had been uniform of calling him.

Now, what was the interest of the stipendiary minister? It was a very remote interest indeed. The titular was the party who had the real and true interest in the teinds. The stipendiary was a sort of creditor of the titular—that was all—and his interest was of a remote kind and might never emerge. It was remote in this case; for it is only now that it has come into existence. The valuation has been recognised and acted on for a very long time, and the defence of the minister for having allowed that to take place is, "I had no interest till now." No interest till now! Why, he says he had an interest 200 years ago. But the interest he had was so remote that it has only emerged now.

LORD CAIRNS:—

I had prepared some remarks to be submitted to your Lordships, but after what has been said by my noble and learned friends who have preceded me I shall content myself with making one or two very general observations upon the cases before us.

The object of these proceedings was to set aside valuations made so long ago as the years 1683, 1684, 1690, and 1697. Those valuations have stood since, and have been acted upon. Therefore your Lordships would be very unwilling to set them aside unless you were satisfied that there was some positive authority which required you to do so.

The character of the objection to these valuations appears to me to be entirely technical. There is no suggestion of collusion or undervaluing. The interest, too, of the person who is said not to have been called appears to have been identical with the interest of the titular who was called, and who became a party to the proceedings. If there is a difference between the two interests, the

interest of the titular appears to me to have been the higher of the two, because the titular was interested in what I will call the *residuum* of the teinds after satisfying the stipendiary.

It is conceded that on a valuation made by the sub-Commissioners the stipendiary would not have been a necessary party; and the argument, therefore, has been, that though his presence was not necessary before the sub-Commissioners (where I should have thought there was more reason that he should be present), he *ought* to have been present before the Commissioners. It is further admitted—and, indeed, it could not be controverted—that the Sovereign, who had, at least, as much interest as the stipendiary, and, I might add, the coheritors, never have been cited, and their interest, at least, has been allowed by statute to be protected by those who were cited.

In addition to these considerations, there is one other which presses very much upon my mind. Beyond all doubt, it was the object of the Legislature in *Scotland*, at the time when the Act of 1633 was passed, to have a valuation made of the teinds of the whole of *Scotland*, and to have that valuation made as soon as possible; and the phrase occurs in one of these Acts that the object of Parliament was to "accomplish and finish the great and glorious work of the valuation of the teinds." I must say it does seem to me, *à priori*, the most unlikely thing in the world that the intention of Parliament at that time could have been to require the stipendiaries all over *Scotland* to relinquish their proper religious avocations, and embark in that which was a species of litigation, either before the sub-Commissioners or before the Commissioners, for the purpose of maintaining their remote right (because it was nothing but remote) to an augmentation of stipend; when the whole of their interest was substantially protected by those who *must* have been called to that valuation.

These considerations would make me very unwilling indeed to come to the conclusion that the stipendiaries were necessary parties to any of these valuations.

Now, with regard to the authorities, I will only say this of them, that, as to the practice of the seventeenth century we have nothing to guide us except three documents, namely, the Commission of 1629, the Act of 1633, and that decree of 1634, a copy of

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which is in the Advocate's Library at *Edinburgh*. Beyond all doubt, every one of these documents existing and having their origin in the seventeenth century is favourable to the case of the Appellants, and unfavourable, in my judgment, to the case of the Respondents. I attach very much less weight to the authorities of the eighteenth century, because the jurisdiction had then been transferred from the Teind Commissioners to the Court of Session, and under that transfer the business was to be conducted in the Court of Session as a regular civil suit. When that became the law it was the most important thing in the world that the Court of Session should require every person who had the same sort of interest which is represented in a civil suit to be called in any proceeding before them sitting as the Commissioners of Teinds. But, my Lords, even with regard to all those authorities running down from the year 1700 (putting aside one or two very recent cases which have been referred to, and which may be said to be now under review, as well as the particular cases upon which we are now engaged), it appears to me that several of them have been founded upon the *Purvishaugh Case* (1), which clearly must be given up as a binding authority for the purpose we are discussing; and as to the others of them, it appears to me that they do not at all establish the proposition for which they are cited, namely, that the stipendiary must have been called in proceedings of this kind.

I am quite prepared to concur in the motion made by my noble and learned friend.

Interlocutors reversed.

Solicitors for the Appellants: *W. & H. P. Sharp; Loch & Maclaurin; Burchells.*

Soicitors for the Respondents: *Martin & Leslie.*

(1) Connell on Tithes, vol. ii. p. 196.

JOHN COPLAND . . . . . APPELLANT; 1871
THE HON. CONSTABLE MAXWELL . . . RESPONDENT *Feb.* 28.

Agricultural Lease, if silent as to Sports, confers no Right to sport on the Lessee.

Held, by Lord *Westbury* and Lord *Colonsay* (agreeing with the Court below), that by the Scotch law if an agricultural lease is silent as to hunting, shooting, fishing, or other similar sports, the right to these enjoyments does not pass to the lessee, but remains in the landlord, by law, without any express or special reservation.

Per LORD WESTBURY:—The peculiar general principle of the law of *Scotland* is, that an agricultural lease includes only rights which are agricultural in their nature.

Per LORD COLONSAY:—The question is, Did the landlord part with rights accessory to his property, but which have no connection with the purposes of an agricultural lease? That where the lease is silent as to fishing, an exclusive right to fish passes to the tenant seems rather an extravagant proposition.

IN this case (1) the Lord Ordinary (2) held that Mr. *Copland*, as tenant under an agricultural lease granted to him by Mr. *Constable Maxwell*, was entitled to fish for trout in a certain pond on the farm, although the lease was silent as to fishing; and although the farm was taken as possessed by a former tenant, Mr. *Herbertson*, who never claimed any right to fish in the pond, which had, in fact, been created and supplied with trout by the landlord, who had, moreover, fenced it off as his own exclusive property.

The Lord Ordinary's finding was, that "under the lease there was no express or implied exclusion of Mr. *Copland's common law right* to fish for trout in the pond referred to;" and although there was no express decision on the point, His Lordship thought it consistent with the general understanding and practice to hold that the right of angling for trout was a common law right communicated to the tenant where there was no express reservation by the landlord.

The Inner House, however, on the 20th of November, 1868,

(1) Court of Session Cases, 3rd Series, vol. vii. p. 142; *Scottish Jurist*, vol. xli. p. 79.
(2) Lord *Barcaple*.

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recalled the Lord Ordinary's interlocutor, and decided that Mr. *Copland* "had no right of trout fishing in the pond referred to;" and they interdicted and prohibited him accordingly. Hence the present appeal to the House.

The *Lord Advocate* (1), Mr. *Manisty*, Q.C., and Mr. *David Brand*, appeared for the Appellant.

Sir *Roundell Palmer*, Q.C., and Mr. *J. T. Anderson*, for the Respondent were not called upon to address the House.

THE LORD CHANCELLOR (2), after stating the question raised by the pleadings, and commenting on the evidence, expressed his opinion that the special circumstances of the case—without saying a word as to the general law—made it clear that the Appellant had no right of fishing in the pond. The judgment complained of was, His Lordship thought, right; and he moved that the appeal should be dismissed with costs.

LORD CHELMSFORD:—

It is unnecessary to determine the general question. It will be quite sufficient, as it appears to me, to decide this case upon its special circumstances. And I agree in the opinion expressed by my noble and learned friend.

LORD WESTBURY,—while cordially agreeing with his noble friends that the special circumstances of this case excluded the tenant's claim,—was yet of opinion that it would be right to apply the peculiar general principle of the law of *Scotland*, namely, that an agricultural lease includes rights only which are agricultural in their nature. His Lordship said:—

I entirely subscribe to what has been cited from the treatise of Mr. *Hunter*, who thus lays down the law: "The right of hunting shooting, and fishing, and of exercising similar sports, subject to liability for damage, is reserved *ex lege*" (3). It does not stand in need of a special reservation, the law supplies that reservation.

(1) Mr. *Young*, Q.C. (2) Lord *Hatherley*.
(3) Hunter on Landlord and Tenant, vol. ii. p. 199.

LORD COLONSAY:—

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Considering the special circumstances of the case it appears to me that the tenant here has no right to fish in this pond. It was part of the farm originally let to Mr. *Herbertson;* but during *Herbertson's* possession it was converted into a pond, for the use of the landlord, to drive the machinery of a tile-work. When that tile-work ceased, the landlord availed himself of the preceding position of matters to convert this pond into a fish-pond, with the full concurrence of *Herbertson;* and from that time forward *Herbertson* does not appear to have exercised, or to have claimed, any right of fishing in the pond, while the landlord and his family appear always to have used and exercised that right. I therefore think that the exclusive right of fishing in this pond belongs to the landlord.

I am also of opinion that the judgment which has been pronounced upon the general question was a right judgment. It is true, I believe, that there is no direct decision upon it. I am not aware that the point has been raised before; but certainly there is no decision against that arrived at by the Inner House in the present case. And the tendency of legal writers, as far as we have them, is in favour of it. As to "the general understanding," which is referred to by the Lord Ordinary, we have no evidence at all. And it rather militates against the existence of that impression when we find an author of eminence, whose work has long been in the hands of the public, and who has carefully considered these matters, I mean Mr. *Hunter,* laying it down the other way (1). And, so far as I know, no writer has stated the doctrine differently. I think it rather an extravagant proposition to hold that in the case of an agricultural lease which is silent as to fishing, the exclusive right of fishing in all the lakes and streams within the boundaries of an extensive farm belongs to the tenant. The Lord Advocate admitted that his argument must go to that length in order to sustain his general proposition.

There is, I believe, a difference between the principles upon which a lease is construed in *Scotland* and those upon which a lease is construed in *England,* for some things are held to be

(1) Mr. *Hunter* says that "the landlord is deemed, *ex lege,* to have reserved to himself the right to the soil."

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transferred by a lease in *England* which are not held to be transferred by a lease in *Scotland*. In *England*, I believe, the right of shooting passes to the tenant by the lease, unless it be reserved (1); but certainly that is not the case in *Scotland*. No express reservation of the right of the landlord is required in *Scotland*. There are also other matters which belong to him. The general principle acted upon in *Scotland* is this: What was this farm let for? Was it let for one purpose or for another? Did the landlord part with rights which are accessory to his right of property, but which have no connection whatever with the enjoyment of the land for the purpose for which the land is let? I do not think, therefore, that a tenant has the right of fishing in a stream, the property of the landlord, running through the farm, or in lakes which are on the farm. He has the enjoyment of the water for the primary uses to which water is applicable, and for which it may be necessary for the purposes of the farm; but the right to catch fish is not necessary for the purposes of the farm. Therefore I apprehend that the general doctrine which has been laid down in the Court below is the sound doctrine; and upon both points I think that this case must be decided against the Appellant.

Interlocutors affirmed, and appeal dismissed with costs.

Solicitors for the Appellant: *Norris, Allen, & Carter.*
Solicitors for the Respondent: *Loch & Maclaurin.*

(1) According to English law the sole right to the land or soil passes to the lessee during his term. No one, not even the landlord, can enter without rendering himself liable to an action for trespass. The nature or object of the lease makes no difference. If the lessor wishes to retain any rights of ownership—such as rights of sporting—the reservation must be an express stipulation. See Platt on Leases, *passim*.

SMEATON . . . . . APPELLANT; 1871
THE MAGISTRATES OF ST. ANDREWS . RESPONDENTS (1). *March* 20.

Statutory Improvements Commissioners (2)—*How far bound by their Contracts.*

These Commissioners are not invested with judicial or even *quasi*-judicial authority. They are to act according to the best of their judgment for the promotion of the objects prescribed; and in the performance of their duty they may enter into reasonable negotiations and contracts, which will bind them, and hold good permanently, unless subsequently displaced under the statutory provisions.

Where the Commissioners had accepted an offer made to arrest litigation; where the acceptance was carried by only fourteen votes against thirteen; and where they afterwards repudiated the contract as likely to prove injurious to the public interest—the House (reversing the decree below) decreed a specific performance, on the ground that the party with whom the agreement was made had relied and had acted upon it, and that they were bound by it.

Statutory Notices.

Notwithstanding the contract the commissioners must, at the proper time, give the notices required by the statute.

Per THE LORD CHANCELLOR:—Notices will have to be issued; so that all parties entitled to object may come forward.

Per LORD COLONSAY:—All that the Commissioners do is subject to the qualifications and conditions of the Act of Parliament.

THE Respondents, as Commissioners under the *General Improvement* (*Scotland*) *Act*, 1862, thought it necessary or expedient to carry a drain for sewage through a portion of *Abbey Park*, the Appellant's property, close to *St. Andrews*. He thereupon gave the notice required by the 36th section of the *Lands Clauses Consolidation* (*Scotland*) *Act*, to have his compensation for the damage which would arise fixed by a jury. After certain unsuccessful attempts at arrangement the Respondents, on the 12th of February 1866, resolved, by a majority of fourteen against thirteen, to accept an offer made by the Appellant as "the basis of an amicable settlement." The acceptance was arrived at, with a slight variation,

(1) The case is fully reported in the 3rd Series, vol. vii. p. 206.

(2) Under the Act of 1862, 25 & 26 Vict. c. 101, entitled "*Police and Improvement Act* (*Scotland*)."

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which on being communicated to the Appellant he acquiesced in, on the 13th of February, the day after the meeting (1).

Relying on what had taken place, the Appellant withdrew his notice of trial. The Respondents, however, began soon to entertain doubts how far their vote had been wise, and whether they were bound. They took counsel, and were advised that the whole affair was *ultrà vires* on their part. They determined, therefore, to repudiate the transaction.

The present suit by the Appellant was in effect for specific performance; calling on the Respondents to execute a formal deed embodying the agreement.

After hearing counsel the Lord Ordinary (2) gave judgment in favour of the Appellant; but the Court of Session (Second Division) reversed the Lord Ordinary's decision and assoilzied the Respondents. Hence the present appeal.

The Lord Advocate (3), Sir *Roundell Palmer*, Q.C., and Mr. *A. Moncrieff*, of the Scotch Bar, were counsel for the Appellant.

Mr. *Jessel*, Q.C., Mr. *Pearson*, Q.C., and Mr. *Campbell Smith*, of the Scotch Bar, appeared for the Respondents.

The following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (4), after carefully examining the pleadings and the evidence, made the following remarks:

My Lords, the duty of the Commissioners involves something more than the resolution of a mere engineering problem. Their judgment is to be exercised in the best manner for the general interests of the town. Among other things, they have to determine the question of expense, and the expediency of escaping heavy claims of damages. I apprehend, therefore, that they had a perfect right to enter into this negotiation with Mr. *Smeaton*.

It is said that the Commissioners are a public body, acting in a *quasi*-judicial capacity, and incapable, therefore, of binding themselves by a special agreement to execute the works in any particular way. It is further said that a body constituted as this

(1) See Lord *Chelmsford's* summary of the facts, *infra*, p. 110.
(2) Lord *Jerviswoode*.
(3) Mr. *Young*, Q.C.
(4) Lord *Hatherley*.

body is ought not to be taken by surprise, and that an agreement carried by a majority of one, as it was upon this occasion, is a thing to be looked at with suspicion; the Commissioners not being at liberty to enter into contracts of this description, snatched from them by a hasty decision, without giving the subject full and mature consideration.

It appears to me, however, that the conclusion at which the Lord Ordinary came was correct, namely, that the Pursuer was entitled to a declaration that the deed sought by him ought to be executed according to the resolution come to upon that evening of the 12th of February, and that, therefore, the interlocutor of the Court of Session, in which their Lordships came to a contrary conclusion, ought to be reversed.

The objection that what took place on the 12th of February was but the mere basis of an agreement, seems wholly unsustainable. The basis of an agreement becomes the agreement itself when it is accepted, and it contains every term which is afterwards to be introduced into the formal deed which shall be executed and which shall receive effect.

I think that, as regards the course to be taken by the Commissioners hereafter in giving effect, or attempting to give effect, to this arrangement, notices will have to be issued, so that all parties who are entitled to object to the proposed line of sewer may come forward. What may be the result of the objections it is not for us say.

It is not necessary that the engineer should certify as to the line being proper in an engineering point of view. He may find, for instance, that damages to Mr. *Smeaton* amounting to £3000 would have to be paid; and I think that the engineer would be very well advised if he certified that a sewer which made such a slight deviation as is here made, and which could be made for £400 or £600, would be the more proper one than one which would cost £3000 or £4000. I think that the matter must be remitted to the Court below, who will see that all proper steps are taken with regard to it.

LORD CHELMSFORD:—

The only question to be determined is, whether the Respondents are bound to execute a formal deed of agreement.

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At the morning sitting of the Commissioners, on the 12th of February, 1866, the "memorandum of the proposed agreement" was laid before them, concluding in these words: "A formal deed, embodying the stipulations and provisions above written, and other necessary formal clauses, shall be prepared by the Commissioners' agent, and revised by the agent of Mr. *Smeaton* (in duplicate) within fourteen days from this date; the expense of said deed to be defrayed by the parties mutually." And this was signed by Mr. *Nicholson* on behalf of Mr. *Smeaton*.

At the evening sitting, the memorandum being read, it was assented to by a majority of *one*. The meeting then directed the clerk to prepare the deed in conformity with the memorandum. The civil engineer (who was present) was also instructed to get the specifications adjusted, to obtain estimates, and to submit such estimates to the Commissioners.

I think there is nothing to interfere with the binding effect of the agreement in the slight variation of the original terms proposed, which variation was on the following day accepted by the Appellant in a letter of the 13th of February 1866.

It seems to have been considered by the Court below that the resolution adopting the memorandum was not binding on the Commissioners until it was communicated to the Appellant, and that there was no regular communication made to him, as the clerk had no authority from the Commissioners to communicate the resolution. But I apprehend that the resolution of the meeting, and the direction to carry out the agreement, bound the Commissioners without any formal communication of their proceedings to the Appellant. The Commissioners must have been informed by their clerk from time to time of the progress which was making towards the preparation of the deed, and they never appear at any time to have suggested that there was no final agreement, or that their clerk had no authority to communicate with the Appellant on that footing. He wrote to the Appellant on the 16th of February 1866, saying, "In consequence of the arrangement that has been made, I think it would be satisfactory that you wrote me withdrawing the notice to have the compensation fixed by a jury, and I beg you will write me accordingly." On the following day accordingly the notice was withdrawn.

That the Commissioners considered the agreement a concluded one, appears also from the report in which they speak of their reluctance to withdraw from it, but say that, "having consulted counsel, they were advised that their resolution was illegal and *ultrà vires*." This, however, was an erroneous opinion.

Another ground suggested for rescinding the agreement was that the surveyor would or might refuse to certify for a sewer in the direction specified. But the certificate of the surveyor is required under the 395th section of the Act only where an objection has been made to the intended work, and after the person making the objection has been heard; and *non constat* that there will be any objection.

There seems to be nothing in the objection that the memorandum was not accepted by them simply, but with a variation; for I am of opinion that the Appellant might at the hearing consent to have the deed with the variation introduced by the Commissioners.

The Commissioners, no doubt, must, at the proper time, give the notices required by the Statute of their intention to construct the sewer in the direction agreed upon; and thus afford an opportunity for objections to the work.

On the whole, I quite agree with my noble and learned friend that the appeal must be dealt with in the manner proposed.

LORD COLONSAY:—

As to the notion that it was *ultrà vires* of the Commissioners to enter into an agreement, and that they had no power to fix upon a deviation line without public notice—the answer is, that before any public notices are given the Statute requires that the Commissioners shall have fixed upon the line. Therefore, there is no inconsistency, and there is no incapacity on the part of the Commissioners to enter into an agreement as to the line which they propose to take.

Being of opinion that the Commissioners fixed themselves by the arrangement that this should be the line to be executed, I think they cannot avoid putting their hands to the deed which is to be the formal fulfilment of that undertaking on their part. But then, what is to be the effect? I think the Commissioners will be doing their duty by giving the statutory notices for the

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line which they have agreed to adopt, so as to afford parties an opportunity of objecting; and I am by no means prepared to say, that if upon those objections the Commissioners are satisfied by the parties objecting that the line is either impracticable, or wholly inexpedient, they would not then be entitled to pronounce judgment against it. They are in no different position in this case from that in which they would have been if they had originally *prescribed* this line and given notices for it. All that they do is subject to the qualifications and conditions of the Act of Parliament. They must give the required notices—they must allow parties to object; the surveyor, who is the statutory officer, is to be called on to give his certificate; and whatever judgment may be pronounced by the Commissioners on hearing the whole matter, it will be competent to the parties interested to make it the subject of an appeal to the Sheriff. I think the true question we have to deal with, and which the Lord Ordinary dealt with, is whether or not there is an executory agreement. It would not be enough to abide by the interlocutor of the Lord Ordinary. There are no operative words in it—nothing out of which operative words can be extracted; and, therefore, I think the best course is that which has been suggested by my noble and learned friend on the woolsack, that we should reverse the judgment complained of, and send the case back to the Court below, expressing the opinion we entertain as to the proper course to be followed. I am not without hopes that when the parties come to look at their true position they will find it more expedient for both of them to go to their work more smoothly than they seem disposed to do at present.

On the motion of the Lord Chancellor, the following judgment was pronounced:

It is Ordered and Adjudged, that the interlocutor of the Second Division complained of in the said appeal be reversed; And it is Declared that there was an agreement concluded between the Appellant and Respondents in the terms of the heads thereof adopted and varied or modified by the Respondents' resolution, and by the Appellant's letter acquiescing therein; and that the Respondents are bound to execute a formal deed in terms of the

agreement as so varied or modified; And it is further Ordered that the Court of Session in *Scotland* adhere to the interlocutor of the Lord Ordinary, with power to the said Court to proceed further as to the said Court shall seem just and expedient, in accordance with this judgment and declaration, and also to dispose of all questions of expenses hitherto incurred in the said Court.

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Solicitors for the Appellant: *Markby, Wilde, & Co.*
Solicitor for the Respondents: *W. Robertson.*

VICKERS . . . . . APPELLANT;
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Advances to Factors—5 & 6 *Vict. c.* 39.

A merchant who has enabled his factor to raise money fraudulently can claim no redress against the party who has, *bonâ fide*, made the advance.

The goods or symbols of property entrusted to the factor may be regarded by unsuspecting third parties as his own, and dealt with accordingly under the *Factors Act*, 5 & 6 Vict. c. 39.

IN 1866, Mr. *Vickers*, of *Manchester*, ordered 800 tons of pig-iron from the *Carron Company;* and, while they held it at his disposal, he employed Messrs. *Campbell Brothers* of *Glasgow* to sell it for him. On the 26th of March, 1866, they wrote to him: "We can now get your price." He agreed; and, on the 28th, sent them an order in the following terms:—"To the *Carron Company.* Please deliver to Messrs. *Campbell Brothers.*" *Campbell Brothers*, instead of employing the document for the purpose of giving delivery to the supposed purchaser, represented it as their own, and asked Mr. *Hertz* of *Glasgow* to make them an advance upon it. Mr. *Hertz* declined till the document should be stamped, and a place of delivery inserted by Mr. *Vickers.* These requirements having been satisfied by Mr. *Vickers*, the *Carron Company* wrote to Mr. *Hertz*, saying: "We have placed the pig-iron indorsed by *Thomas Vickers*, Esq., to your credit." Mr. *Hertz* thereupon advanced to *Campbell Brothers* three distinct sums, amounting in all to £2400. The act of *Campbell Brothers* was a gross fraud upon Mr. *Vickers*,

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who knew nothing of the transfer to Mr. *Hertz*, although he had unsuspectingly facilitated its accomplishment. *Campbell Brothers* having become bankrupt, disappeared; so that the action which led to the present appeal was brought by Mr. *Vickers* against Mr. *Hertz* for delivery of the iron. The defence was, that the iron had been acquired by Mr. *Hertz* legitimately, under an order indorsed by Mr. *Vickers*, and delivered by his factors to Mr. *Hertz*, who afterwards sold it for less than he had advanced upon it.

The Court of Session gave judgment in favour of Mr. *Hertz*, not proceeding on the Factory Statutes (1), but following their own decision in *Pochin* v. *Robinow* (2).

Mr. *Vickers* appealed to the House.

The Lord Advocate (3), Mr. *Joseph Brown*, Q.C., and Mr. *A. V. Dicey*, were counsel for Mr. *Vickers*.

Sir *Roundell Palmer*, Q.C., and Mr. *Jessel*, Q.C., appeared for Mr. *Hertz*.

After hearing the Lord Advocate and Mr. *Brown*, their Lordships, without calling on the Respondent's counsel, delivered the following opinions:—

THE LORD CHANCELLOR (4):—

This case was argued with great ability by the Lord Advocate, who, however, took no notice whatever of that which must ultimately govern our decision, namely, the Factors Acts. He left it to Mr. *Brown* to satisfy your Lordships that *Hertz*, the lender of the money, had not acquired a title to the iron by virtue of these enactments. The learned Judges in *Scotland* so far justified the Lord Advocate, because they did not advert to the Factors Acts, but rested their judgment on the ground that the documents which

(1) 4 Geo. 4, c. 83: "An Act for the better protection of the Property of Merchants entering into Contracts in relation to Goods, &c., entrusted to Factors or Agents."

6 Geo. 4, c. 94: "An Act to amend the 4 Geo. 4, c. 83."

5 & 6 Vict. c. 39: "An Act to amend the Law relating to Advances *bonâ fide* made to Agents entrusted with Goods."

(2) 3rd Series, vol. vii. p. 622. In *Pochin* v. *Robinow* a doubt was expressed as to the Factors Acts applying to *Scotland*. *Vickers* v. *Hertz* is not reported below.

(3) Mr. *Young*, Q.C.

(4) Lord *Hatherley*.

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had been placed in the hands of *Campbell Brothers* by *Vickers* had put them in possession of a right which they were entitled to transmit to others.

The Lord Advocate contended that *Campbell Brothers* were only mandatories of *Vickers* for the purpose of obtaining delivery of the iron of which *Vickers* was the purchaser. But there was nothing on the face of the document given to *Campbell Brothers* shewing it to be simply of a mandatory character. The Lord Advocate urged that it did not appear on the face of the note whether they were purchasers or owners, or whether they were mere agents or mandatories; and he insisted that any party who received this document from *Campbell Brothers*, seeing it so imperfect and inconclusive on the face of it, would not be entitled to derive any other right from the possession of the instrument than that which *Campbell Brothers* themselves possessed.

When, however, one person arms another with a symbol of property he should be the sufferer, and not the person who gives credit to the operation and is misled by it. Originally, it was thought right that factors who were entrusted with the right of selling goods for others, if they chose to make sales on their own account, should be dealt with as competent to make a title to the goods (1). That was extended by the second Act (2) to a power to mortgage; but in each of the first two Acts there was a proviso that the person who so dealt with the factor must have dealt with him not knowing that he occupied the position of factor, because if he knew that he occupied that position he was not to be entitled to have the benefits of those Acts.

Then at last came the 5 & 6 Vict. c. 39 (3), by which a person dealing with a factor is protected. How is he protected? It is there enacted that "Any agent entrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be the owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security *bonâ fide* made with such agent so entrusted." The

(1) 4 Geo. 4, c. 83, "for the better protection of Merchants entering into Contracts in relation to Goods, &c., entrusted to Factors or Agents."

(2) 6 Geo. 4, c. 94.

(3) "An Act to amend the Law relating to Advances *bonâ fide* made to Agents entrusted with Goods."

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4th section says: "That any order for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, shall be deemed and taken to be a document of title within the meaning of this Act." It appears to me that the documents in the present case come expressly within the terms of that section.

An argument was pressed by Mr. *Brown*, that this Act applies all through to actually specified goods. But here the goods were goods of the *Carron Company* deliverable on demand. This is not a case of goods manufactured specially for the purpose of the contract. The *Carron Company* have at all times large quantities of iron at their disposal ready for any demand that may arise. One of your Lordships put the case of a delivery order for 100 hogsheads of wine, or 100 tons of coal in a particular ship,—could it be said, that because each 100 hogsheads, or each 100 tons, could be delivered specifically, the matter would be beyond the Statutes? The construction suggested would be to narrow unduly the operation of these Acts, which were intended for the best interests of commerce and for the benefit of all engaged in trade.

I think that the decision of the Court below was right, and that it ought to be affirmed, and the appeal dismissed with costs.

LORD CHELMSFORD (1):—

My Lords, if this case had to be decided independently of the Factors Acts, I should have required to hear the learned Counsel for the Respondent before I came to any decision.

My difficulty throughout the argument has been to understand exactly what was the effect of the indorsements to *Campbell Brothers* of the delivery orders by the agents of the *Carron Company*. Those indorsements (with one exception) are in these terms: "*Carron Company*, please deliver Messrs. *Campbell Brothers* as per order." Now the order referred to is: "Please deliver on account of Order No. 65, to the order of *Thomas Vickers*, 200 tons of No. 1 *Carron* pig-iron." If the words "as per order" refer to the order of *Vickers*, to whom, or to whose order, the iron was to be delivered, then the indorsements restrained the delivery to *Campbell Brothers* for the account and on the behalf of *Vickers*.

(1) His Lordship delivered a written judgment.

If this were the case, the indorsements to *Hertz* by *Campbell Brothers* would have been a diversion from the object for which the indorsements were made to them. In that case *Hertz* would have received documents which shewed him the limited right possessed by *Campbell Brothers* to receive the iron for *Vickers*, and he could not be regarded as a *bonâ fide* holder of delivery orders transferring to him a right to the delivery of the iron. If, then, with a knowledge of the limited authority given to *Campbell Brothers*, *Hertz* used documents which gave him no just ground for believing that they had any authority to indorse the delivery orders to him, and obtained the iron from the *Carron Company*, even if the company were excusable for delivering it to him upon the documents, he would be wrongfully possessed of the iron and answerable to the Appellant.

But I am disposed to think that the words "as per order" in the indorsements of the delivery orders to *Campbell Brothers* do not apply to the order of *Vickers*, by which the delivery of the iron was to be directed by him, but to the order which must have been the original contract with the *Carron Company*, by which the iron was sold to *Vickers*. If this is so, then the indorsements to *Campbell Brothers* "as per order" would have given them an authority over the contract, and have enabled *Hertz* with perfect *bona fides* to advance his money upon the security of the documents of title—and under these circumstances *Hertz* would have had a perfect defence to the action of the Appellant.

But I entertain no doubt that *Hertz* has a complete answer to the action under the Factors Acts, by the indorsement of the delivery orders by *Campbell Brothers* to him.

It was objected that the delivery orders were not within the Acts, because there were no specific goods to which they were applicable, and because *Campbell Brothers* were not entrusted with the delivery orders for sale of the goods to which they related. There appears to me to be no ground for these objections. The orders were for the delivery of specific quantities of iron which had been previously purchased by *Vickers*, and which he was entitled to have delivered to him on demand. Upon the production of those delivery orders, the quantities of iron mentioned in them must have been forthcoming, and it seems to me to have been

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perfectly immaterial whether these quantities had been previously set apart awaiting the demand for delivery, or whether they were, on the production of the delivery orders, separated from a larger quantity.

With respect to the objection that *Campbell Brothers* were not intrusted with the delivery orders for the purpose of sale of the iron, it appears to me that it is founded upon the erroneous notion that in order to bring a dealing with a delivery order within the Factors Acts, it should be placed in a factor's hands before any sale of the goods to which it relates has been effected, and in order to enable him to make such sale. But, surely, if a factor has sold his principal's goods, and the principal sends him the delivery order for the purpose of completing the sale by the delivery of the goods, this may, without doing any violence to language, be called an entrusting of the factor with the delivery order for the sale of the goods. In the present case, *Vickers* was cheated out of the delivery order by *Campbell Brothers*—but that is not material—he was told, and believed, that *Campbell Brothers* had sold his iron, and he sent the orders to them, and so entrusted them for the express purpose of carrying out the supposed sale.

I agree, then, with my noble and learned friend on the woolsack, that the interlocutors must be affirmed.

LORD WESTBURY:—

If the attention of your Lordships had been called at the beginning of this argument to the fact that the question depended on the construction of the Factors Acts, a great deal of judicial time would have been usefully saved. There can be no doubt that it lies wholly within the compass of those statutes.

Mr. Justice *Willes* is reported to have said, that the factor must be deemed to be a factor *for the sale* (1). What is stated in the Act is, that a factor who is entrusted with the goods, or with a document of title, shall be authorized to deal with the goods in a particular manner. And then the 4th section goes on to define what is meant by a "document of title;" and the definition given is one which will include these orders. What we have to inquire, therefore, in this case is, whether the factor was entrusted by the

(1) *Fuentes* v. *Montis*, Law Rep. 3 C. P. 268.

owner with a possession of a document of title entitling the factor to give possession of the goods. That undoubtedly he was. If the words of the Act had been "factor for sale," I should have been of opinion, undoubtedly, that that meant one who has contracted to sell, but has not completed the sale, but has received from his principal a document of title in order to complete the sale, and who, as the recipient of that order, is an agent for the sale within the meaning of those words. The words "factor for sale," however, are not found in the Act; and the question simply is this: Were *Campbell Brothers* intrusted with the possession of a document of title? Undoubtedly they were, and therefore they were authorized to deal with the document in favour of *Hertz* in the manner they have done.

It is perfectly clear that *Campbell Brothers* would answer the description of "factors intrusted with a document of title," although not entitling them, on the face of it, to transfer it by indorsement. The power to deal with the document is a power derived from the enabling clauses in the Act, and does not require for that purpose any particular form of indorsement beyond that which enables them to be designated as persons intrusted with the possession of a document of title.

It must be regretted, my Lords, that a matter resting purely on two or three verbal subtleties should have been brought up to this House.

LORD COLONSAY:—

I think that this case comes clearly within the scope of the Factors Acts; but I may say further, that on the grounds taken in the Court below I should also have been of opinion that the judgment appealed from was well founded. The Scotch Law had gravitated in that direction for a considerable time previously to these statutes; Mr. *Bell* laying it down expressly that a factor had the power to pledge his principal's property (1).

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Solicitors for the Appellant: *Simson & Wakeford.*
Solicitors for the Respondent: *Grahames & Wardlaw.*

(1) Bell's Commentaries, vol. i. p. 250.

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May 9.

CARTER *et al.* . . . . . APPELLANTS;
McLAREN & Co. . . . . RESPONDENTS.

Bankruptcy—Fraudulent Preference—Severe Statutory Penalties.

By the *Scotch Bankruptcy Statute* of 1856 (19 & 20 Vict. c. 79) it is enacted that if any creditor shall receive a gratuity, or enter into any secret or collusive agreement for facilitating the bankrupt's discharge, such creditor shall not only forfeit his claim against the estate, but pay to the trustee thereof double the amount of the gratuity.

Under this statute it was held by the House (reversing the decree below) that a creditor who had been secretly induced by a sum of money to acquiesce in a dividend which he had previously opposed, was subject to the penalties of the statute;—although he had stipulated and obtained an assurance when receiving the money that it should not come from the other creditors; and although he returned the amount with interest immediately on being told that his conduct in accepting it was a breach of the law, and was censured.

Per THE LORD CHANCELLOR:—If a creditor can obtain for himself an advantage of this description, he is at once enabled to frustrate the policy of the Bankrupt Law, which is to secure to all the creditors an equal distribution, and to give the bankrupt himself advantages when the property is fairly made over.

Per LORD CHELMSFORD:—The receipt of the bribe constitutes the offence. Collusion and secrecy are immaterial.

Negation of Judicial Discretion.

The statute enacts, that upon a petition by the trustee or any creditor, the Lord Ordinary shall decree the penalties prescribed, "*if no cause be shewn to the contrary.*" The Court below (Lord *Kinloch diss.*) held that these words gave them a discretion, in the exercise of which, under all the circumstances, they abstained from enforcing the penalties (1). This decision reversed.

Per LORD CHELMSFORD:—If a discretionary power was meant to be given, the power would have been expressed in the clearest language.

Per LORD WESTBURY:—It is quite out of the question to hold that this statute confers a discretionary power to apply its enactments or not. They are passed to secure commercial morality, and we must enforce them without any attempt to mitigate their severity.

IN 1869, *James* and *John Prendreigh*, merchants in *Edinburgh*, were made bankrupt. *McLaren & Co.*, who were creditors, objected to a composition offered of 7*s.* 3*d.* in the pound. Means, however, were used to allay their opposition. A letter was written to them by a friend of the bankrupts (who was also a large creditor) offering

(1) See 3rd Series, vol. viii. p. 64.

McLaren & Co. 9*s.* in the pound instead of 7*s.* 3*d.*; but stating that "the contents of this letter must be held strictly private and confidential." *McLaren & Co.* answered, that "that they would not accept a single penny *from the creditors*." A reply came, assuring *McLaren & Co.* that the additional 1*s.* 9*d.* in the pound would come, "not from the creditors, but from a near friend of the *Prendreighs*." This assurance satisfied the scruples of *McLaren & Co.*, who accordingly accepted the dividend with the addition, undertaking, however, to return the 1*s.* 9*d.* "in the event of the *Prendreighs* failing to obtain the settlement proposed." Soon afterwards *McLaren & Co.* were informed that what they had done was illegal. They immediately returned the money they had received, and renewed their opposition to the composition; whereupon the trustee presented his petition praying a declaration that *McLaren & Co.* had forfeited their claim as creditors, and were also bound to pay to the trustee double the amount of the gratuity which they had received (1).

After a variety of procedure it was ultimately decided by the Court of Session that *McLaren & Co.* had not forfeited their claim against the bankrupt estate, or incurred any of the penalties imposed by the statute; but, in the words of the 150th section of the Act, had "shewn good cause to the contrary."

Against this decision the trustee appealed to the House.

Sir *Roundell Palmer*, Q.C., Mr. *Lloyd*, Q.C., and Mr. *Trayner*, appeared for the Trustee.

The Lord Advocate (2), Mr. *Jessel*, Q.C., and Mr. *Edward Rowland*, appeared for the Respondents.

The following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (3):—

My Lords, in my opinion, the statute is to apply with full and complete effect when the offence which it condemns has been committed. This Act of Parliament evinces the extreme anxiety of the Legislature, under every state of circumstances, to prevent any

(1) See Lord *Chelmsford's* fuller statement of the facts, *infra*, p. 123.
(2) Mr. *Young*, Q.C. (3) Lord *Hatherley*.

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person from engaging in a transaction of the character appearing in the present case by holding over any one disposed so to act an extreme and severe penalty. There is no power in the Court to remit or mitigate any portion of the penalty. The Legislature intended finally and decisively to strike at the offence; because if a creditor can be at liberty to obtain for himself an advantage of this description, he is at once enabled to frustrate the whole policy of the bankruptcy law, which is to secure to all the creditors an equal distribution, giving to none a preference, and giving to the bankrupt himself advantages when the property is thus fairly made over. Then, is the Court entitled to say the offence has been committed, but under circumstances which entitle us to refuse the prayer of the trustee's petition?

I agree with the remark made by Sir *Roundell Palmer* as to the words, "if no cause be shewn to the contrary." So far as my memory can go back (and I have been able to make search into the matter) I have never found a single instance of those words being employed where the intent was that there should be a discretionary power in the tribunal before whom the matter was brought. Everything that is required to be done by the Court is imperative, with the single exception "of cause being shewn to the contrary."

It might have been shewn that the person presenting the petition was not competent to do so, or that the bankruptcy had been superseded, and the debts paid and satisfied. Of course, in some such cases "cause might be shewn to the contrary;" and I am not prepared to say that it might not be good cause to shew that every single creditor (the trustee who has presented the petition not being a creditor) was desirous that the petition should be withdrawn. This is not a case in which the penalty is to be sued for as affecting the administration of justice. It is not imperative on the trustee to present the petition. The Act says that he may so do. There may, therefore, possibly be circumstances which may amount to "cause shewn" why the Court should not pass sentence, although the offence has been committed.

I have no objection to say that, from the Respondents' statement, I am quite willing to conceive that they were acting with

the motive not only of facilitating the discharge of the bankrupts (which certainly was one object in view), but also of promoting the wishes and desires of many of the creditors. But I apprehend that before the Respondents can entitle themselves to a discharge upon that ground they must satisfy us, by the stopping of these proceedings altogether on the part of the trustee (which it would not be difficult to do, if he were so minded), that he had the concurrence of all the creditors in the transaction before we can say that there has been anything approximating to "cause shewn" why, the offence having been committed, the sentence should not be carried into effect.

LORD CHELMSFORD :—

The *Prendreighs* having carried on business as grain merchants, and also as brewers, in *Edinburgh*, and having fallen into embarrassment, separate sequestrations were issued against them. *McLaren & Co.* were creditors of the grain concern only. At a meeting of the creditors each firm offered a composition of 3*s.* 7½*d.*, making together 7*s.* 3*d.* in the pound, upon the footing that all the creditors should be entitled to rank upon the estates of both firms. *McLaren & Co.* objected to the composition on the ground of its insufficiency, and also on account of its mixing up the estates of the two firms.

Mr. *Daniel Smith*, a creditor for a large amount, was in favour of the composition. He was examined, and said :—

Messrs. *McLaren & Co.* being against the composition, I used means to bring them round. I bought them off by paying them 1*s.* 9*d.* per pound more than the other creditors were to receive. I arranged with Mr. *Weir* to aid me by conveying this money to them, and that was done. Their opposition was discontinued.

The negotiation with Messrs. *McLaren* was opened by a letter from Mr. *Weir* to them, dated the 30th of April, 1869, and marked "private," in these terms :—

Referring to our conversation yesterday, I am now authorized to pay you 1*s.* 9*d.* per pound on the amount of your claims on condition that you withdraw all opposition, and that a settlement be effected at 7*s.* 3*d.* per pound with the other creditors. I further agree to write you a satisfactory letter stating the circumstances under which you have been induced to entertain this offer; but in the meantime the contents of this letter must be held strictly private and confidential.

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McLaren & Co. stated in answer that they would not accept a single penny *from the creditors*, but that they would withdraw their opposition, "provided *Prendreighs* would make up their dividend to 9*s.* per pound." And being informed in a letter from Mr. *Smith*, dated the 1st of May, 1869, that the difference between 7*s.* 3*d.* and 9*s.* came from a near friend of the *Prendreighs*, and not from any creditor on their estate, *McLaren & Co.*, on the 13th of May, 1869, received the sum of £226 9*s.* 3*d.*, being the amount of 1*s.* 9*d.* on their claim of £2654 10*s.* 11*d.*, minus 2½ per cent. discount. They acknowledged receipt in a letter, saying they would return the £226 9*s.* 3*d.* to Mr. *Smith* in the event of the *Prendreighs* failing to obtain a settlement as proposed. Mr. *David McLaren*, on his examination, swore that he did not imagine there was the least illegality in receiving this money. A meeting of the creditors took place on Friday, the 21st of May, for the purpose of deciding on the offer of the composition of 7*s.* 3*d.* in the pound, and it was unanimously agreed to accept it. Mr. *McLaren*, in his evidence, states that on the Saturday he had heard it said that a great many of the creditors censured the conduct of his firm in receiving more than the 7*s.* 3*d.*, adding that on the 24th of May he was sent for by his law agents, who shewed him the 150th section of the *Bankruptcy Act*, and told him that the arrangement he had entered into was a very awkward thing, and he was very much astonished indeed when he read it. On the following day, the 25th of May, 1869, *McLaren & Co.* returned to Mr. *Weir* the amount received from him, with 5 per cent. interest, stating in the letter inclosing the cheque that they had "ascertained that the transaction which Mr. *Weir* induced them to enter into was illegal under the *Bankrupt Statute*." On the 26th of May *McLaren & Co.* issued a circular apprising the creditors of what had been done; and having thus cancelled the transaction, they renewed their opposition to the composition. A week after the return of the money the trustee filed the petition out of which the present appeal arises.

The learned counsel for the Respondents objected that the petitioner was bound by the terms of his petition to prove that the agreement entered into by the Respondents was secret and collusive, and they maintained that the petitioner had failed to give such proofs. But if a creditor actually receives a sum of money as

a consideration for concurring in facilitating or obtaining a bankrupt's discharge, it is immaterial whether the money is received in pursuance of a secret or collusive agreement or not. The receipt of the money constitutes the offence. Now, as that is a complete offence in itself, all the allegations about the secret and collusive agreement may be treated as merely a narrative introductory to the charge, and not as any part of the charge to be sustained by proof. If, however, the trustee had been called upon for such proof, I should have thought that he had satisfied the obligation by the evidence produced. The negotiation for the withdrawal of *McLaren & Co.'s* opposition to the composition was commenced on behalf of *Daniel Smith*, one of the creditors, apparently without the knowledge of any of the others; and the first communication by his agent, Mr. *Weir*, to *McLaren & Co.* impressed upon them that the contents of his letter were "to be held to be strictly private and confidential." But, at all events, it was unknown to the trustee, whose duty it is to take care that no creditor obtains an advantage over the others. So far, therefore, as the trustee is concerned, and as to some of the creditors, the transaction was secret; and as it was in violation of the statute, it may properly be said to have been collusive.

The moment the Respondents received the money the offence was complete; and no repentance or restitution could purge it, unless a *locus pœnitentiæ* were provided by the Act. This, the Judges say, is intended to be given by the words, "if no cause be shewn to the contrary." But if a discretionary power was meant to be given where a party legally delinquent had erred through ignorance, but not immorally, the power would have been expressed in the clearest language.

I cannot help observing that the Judges, in exercising their supposed discretion, have disregarded one of the fundamental maxims of the law, "*ignorantia juris non excusat.*" Every man is presumed to know the law (and perhaps more emphatically the statute law) of the realm; and to allow asserted ignorance to plead—not in extenuation, but in entire discharge from all penal consequences—seems to me to be contrary to principle, and to establish a bad precedent. The fact of ignorance can only be proved by the evidence of the party alleging his ignorance, and

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can never be satisfactorily ascertained. And one cannot help being surprised that commercial men like the Respondents should be ignorant (which, upon Mr. *David McLaren's* evidence, I assume they were) of the provisions of the Scotch *Bankrupt Act* with respect to compositions with creditors. At all events, they knew that the principle of these compositions is that all the creditors should fare alike. They were of opinion that the bankrupts' estate ought to pay more than 7*s.* 3*d.* in the pound, and with this belief they stipulate for an increased payment to themselves; and having received it, they remove the obstruction they had interposed to the creditors consenting to take a composition which they believed was less than they ought to have insisted upon, and than the bankrupts' estate would yield. I confess I am not much struck with the hardship of the case under these circumstances.

But it is unnecessary further to consider the grounds upon which the Judges relieved the Respondents from the penalties, because I am satisfied that it was not within their competency to do so.

LORD WESTBURY:—

It is quite out of the question to hold that this statute conferred upon a Court of justice a discretionary power to apply its enactments or not.

There are two maxims which must never be weakened: one is that you must ascribe to every subject a knowledge of the law,—more especially in cases where it prescribes a rule of civil conduct. The other maxim is, that you must ascribe to every man a knowledge of that which is a necessary and inevitable result of an act deliberately done by him.

I give the Respondents full credit for not desiring to secure an undue advantage to themselves at the expense of others who were their rivals in this distribution of the bankrupts' estate. I believe that they acted simply from the reason that they themselves put forward, that they believed that the bankrupts' estate, if worked out, would give a greater dividend than the composition that was offered; and that they accepted this sum of money, therefore, in the conviction that they received only that which was their due, or somewhat less than their due, and that they did it merely

because the long delay which might otherwise occur in the final distribution of this estate might be injurious to the smaller creditors, who were less able to wait for the ultimate dividend than they themselves might have been. But it is important that these enactments, which are passed to secure commercial morality and fair dealing between creditors, should not be in any respect impaired or modified, but, on the contrary, enforced without any attempt to mitigate their application.

LORD COLONSAY:—

The only point of any real difficulty that has been made in this case is with reference to the words "unless cause be shewn to the contrary,"—as to which I think it enough to say that I concur in the views which have been expressed by your Lordships.

Reversal: with a declaration that the Respondents had forfeited their claim as creditors on the bankrupt estate, and should be ordered by the Court below to pay double the amount of the gratuity they had received. Cause remitted.

Solicitors for the Appellants: *Simson & Wakeford.*
Solicitor for the Respondents: *William Robertson.*

1871 McLEAN & HOPE . . . . . APPELLANTS;

April 3. FLEMING . . . . . RESPONDENT.

Bill of Lading.

Case in which it was held that the master of a ship, by signing bills of lading, did not bind the owner to deliver the amount of goods specified in the bills, but the amount (a much smaller quantity) which had been actually put on board.

Deficient Cargo—Dead Freight.

What is called dead freight is defined to be simply an unliquidated compensation recoverable by the shipowner from the freighter for deficiency of cargo.

Per LORD WESTBURY:—Unless a specific sum be fixed for dead freight, all reasonable charges must be deducted.

Lien.

By express stipulation there may be a lien for dead freight.

Per LORD CHELMSFORD:—The charterparty here gives an express lien for the deficient cargo; but the case can hardly be called one of unliquidated damages—the master not having brought home any other goods than those of the freighters.

IN 1864 the Appellants, merchants in *Edinburgh*, ordered a cargo of cattle bones from Messrs. *Whittaker*, of *Constantinople*; and it was arranged that a ship, then at *Constantinople*, and belonging to the Respondent, a merchant, in *London*, should carry the goods to some port (in the *United Kingdom*) to be named by the Appellants. The quantity purchased was 701 tons.

The master entered into a charterparty with a broker at *Constantinople*, acting as freighter on behalf of the Appellants, whereby the owner of the ship was to have an absolute lien on the cargo, not only for actual freight, but also for *dead* freight.

The ship touched at various ports on her way to this country; receiving at each port certain quantities of cattle bones, for which the master signed bills of lading, which were duly indorsed to the Appellants. These bills of lading represented the total quantity shipped as amounting to 701 tons (1); whereas the actual quantity on board when the ship arrived ultimately at *Aberdeen*, the place

(1) There were, however, above the master's signature these words: "Weight, quality, and contents unknown," and it appeared that he protested for inadequacy of freight.

of her destination, was but 386 tons—being 210 tons short of what she could have carried.

The Appellants demanded delivery of the quantity specified in the bills of lading of which they were the holders. The captain, on the other hand, offered to deliver the actual cargo on board, which he said was all that he had got, but upon condition of receiving both freight and dead freight; that is to say, real freight for the 386 tons, and dead freight for the 212.

Under these circumstances application was made to the Sheriff of *Aberdeenshire*, conformably to whose order the cargo was unloaded and stored, to await decision.

After much correspondence between the parties and their solicitors as to their respective claims, cross actions were brought in the Court of Session with a view mainly to determine the question of fact as to the quantity of bones actually received by the master; and the question of law as to dead freight arising on the deficiency of the cargo. The Lord Ordinary (1) held the evidence insufficient to prove that any larger quantity of bones than that delivered at *Aberdeen* had been put on board. He therefore assoilzied the Respondent, Mr. *Fleming*, from the conclusions of Messrs. *McLean & Hope's* action—while in the cross-action his Lordship found them liable for the real freight and for the dead freight claimed by the Respondent. To the Lord Ordinary's judgment the Second Division of the Court of Session adhered on the 5th of June, 1868 (2); and hence the present appeal to the House.

The Lord Advocate (3) and Sir *Roundell Palmer*, Q.C., (Mr. *Lanion* with them) were heard for the Appellants.

Sir *George Honyman*, Q.C., and Mr. *Jessel*, Q.C., (Mr. *Shiress Will* with them), addressed the House for the Respondents.

The Lord Chancellor (4) after examining the evidence and the pleadings, proceeded as follows:—

My Lords, we here find a clear case of an omission to supply a

(1) Lord *Kinloch*.
(2) The case is not reported below; but see *McLean & Hope* v. *Munck*, 14 June, 1867, Third Series, vol. v., p. 893.
(3) Mr. *Young*, Q.C.
(4) Lord *Hatherley*.

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full cargo as contracted for. Messrs. *McLean & Hope* say they are not tied to the terms of the charterparty in respect of dead freight. They say, moreover, that they have a right conferred upon them by the bills of lading, which specify the quantity of bones to be delivered on the arrival of the ship. The evidence, however, establishes clearly that whatever lien was conferred by the charterparty must attach to those who availed themselves of it. I apprehend, therefore, if you once get at the principle that a lien for dead freight may exist by a specific contract, there never was a case in which it could be clearer that parties who accepted the services of the ship were bound to submit to the conditions of the charterparty.

I am, therefore, decidedly of opinion that the appeal in this case should be dismissed with costs.

Lord Chelmsford (1):—

My Lords, the first question to be considered is whether there was evidence that the cargo shipped was to the extent only of the quantity found to be in the ship on her arrival at *Aberdeen*. On this point your Lordships entertained so clear an opinion at the close of the argument for the Appellants, that you did not require any answer on the part of the Respondent. It was contended, and properly contended, by the learned counsel for the Appellants that the bills of lading signed by the master were *primâ facie* evidence that the quantities of bones mentioned in them had been received on board the vessel. The master is the agent of the shipowner in every contract made in the usual course of the employment of the ship. And though he has no authority to sign bills of lading for a greater quantity of goods than is actually put on board, yet, as it is not to be presumed that he has exceeded his duty, his signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the shipowner the *onus* of falsifying them, and proving that he received a less quantity of goods to carry than is thus acknowledged by his agent. But it being admitted that it lay upon the shipowner to rebut the *primâ facie* evidence arising from the bills of lading, he appears to me to have satisfactorily done so. If the evidence of the master is to be believed (and there seems

(1) Lord *Chelmsford's* was a written opinion, afterwards printed for revision.

no reason to doubt it), it is impossible that the additional quantity of bones could at any time have been on board the vessel. In the course of his evidence, the master said, "I brought to *Aberdeen* the whole of the cargo that was shipped. No part of it was put away either by myself or any one else. No part of it was interfered with from the time it was put on board till it was landed at *Aberdeen*." It is no slight confirmation of the evidence that there was not a full and complete cargo when the ship sailed from *Enos*, the last place of loading, that the quantity of bones delivered on the 3rd of April, 1865, having exhausted all that were there for delivery, the captain on the following day, the 4th of April, went before the vice-consul at *Enos*, and in a formal document stated that he had informed the agent of *Whittaker & Co.*, in the presence of the vice-consul (who must have known whether the statement was correct), that not having received a full cargo for his vessel, he reserved his right to protest, and formally protested against the freighter. The Appellants were not able to meet this evidence by proof that the quantities mentioned in the bill of lading, or any more than the 386 tons, were actually shipped. And this question was therefore properly determined by the Lord Ordinary, and by the Court of the Second Division, in favour of the Respondent.

The questions then remain, first, whether the 210 tons short of a complete cargo can be regarded as dead freight, to which the lien in the charterparty applies; and, secondly, supposing a lien to have existed, whether it was available against the Appellants.

The Lord Advocate argued that the rule as to dead freight was inapplicable to a case where the neglect to supply a full cargo under a charterparty results in a claim to unliquidated damages, and that by law dead freight can exist only where there is an express stipulation for a certain amount to be payable *eo nomine*. Upon the question of enforcing the lien against the Appellants in respect of dead freight, he contended that they were indorsees for value of the bills of lading, which bound them merely to pay "freight for the goods as per charterparty," and imposed upon them no liability for dead freight, even if any were payable under the charterparty.

It must be admitted that the term "dead freight" is an inaccurate expression of the thing signified by it. "It is," as Lord

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Ellenborough said in *Phillips* v. *Rodie* (1), "not freight, but an unliquidated compensation for the loss of freight recoverable in the absence and place of freight."

The learned counsel for the Appellants, in support of their argument that no dead freight properly so called was agreed to be paid under the charterparty in question, cited the cases of *Kirchner* v. *Venus* (2), and *Pearson* v. *Goschen* (3).

The case of *Pearson* v. *Goschen* was referred to for some dicta of the Judges, not defining what dead freight was, but stating what it was not. In the case of *Kerchner* v. *Venus* there was no attempt to define, and no necessity for a definition of, the term "dead freight." The Judicial Committee merely decided that a sum of money payable before the arrival of the ship at her port of discharge, and payable by the shippers of the goods at the port of shipment, did not acquire the legal character of freight because it was described under that name in the bill of lading; that it was in effect money to be paid for taking the goods, and undertaking to carry, and not for carrying them. With respect to the observations of the learned Judges upon the subject of dead freight in the case of *Pearson* v. *Goschen*, your Lordships were told that there is a case standing for judgment in the Court of Exchequer Chamber in which their opinions may have to be considered. I shall therefore abstain from any remarks upon them.

It was argued for the Appellants that even if a claim for damages for breach of a covenant in a charterparty to furnish a full lading to a ship may be correctly called "dead freight," yet that no lien can exist where the damages are unliquidated. But I understand the case of *Phillips* v. *Rodie* (1) not to have denied that though the damages were unliquidated, there might have been a lien upon the cargo for them if the contract of the parties had stipulated for it, which it had not. And in the case of *Birley* v. *Gladstone* (4), cited by the counsel for the Appellants, there was no actual decision upon the question of lien for dead freight; but it was held that a clause mutually binding the shipowner and the ship, and the freighter and the cargo, in a penalty could not be considered as intended to give the shipowner a lien for the non-performance of the covenant in the

(1) 15 East, 554.
(2) 12 Moo. P. C. 361.
(3) 17 C. B. (N.S.) 352.
(4) 3 Maule & Selwyn, 205.

(3) SC 10 Jur NS 903.

charterparty to load a full cargo. It may be observed that even where there is an express stipulation to pay full freight, as if the goods had been actually loaded on board, and that the master shall have the same lien upon the goods actually on board as if the ship had been fully laden, the case may be one of unliquidated damages, for the master may have filled the vacant space with the goods of other persons, and the freighter would be entitled to have an allowance for the profit thus made.

In construing the charterparty, it must be assumed that the parties understood the meaning of the terms they employed, and that, amongst others, the term "dead freight" meant (according to Lord Ellenborough's definition), "an unliquidated compensation for the loss of freight." The freighter, with this understanding, agrees to load on board the Respondent's ship a full and complete cargo of cattle bones, and to pay freight at the rate of 35*s.* sterling English, per ton. He knows that if he fail to perform his covenant to load a full and complete cargo he will be liable to the shipowner in damages under the name of dead freight, and he agrees to give the captain or shipowner an absolute lien on the cargo for all freight, dead freight, and demurrage. Why should not his agreement have its intended effect?

This case can hardly be considered to be one of unliquidated damages, because the master, not having brought home any other goods than those of the Appellants, the proper measure of the shipowner's claim appears to be the amount of the agreed freight which he would have earned upon the deficient quantity of 210 tons of bones. But whether the amount of his damages is to be regarded as ascertained or not, I am of opinion that the charterparty gives him a lien for his claim on account of the deficient cargo. Was this lien then available against the Appellants? I quite agree that if they were merely holders of the bills of lading for valuable consideration, the shipowner would not have been entitled to a lien upon the cargo on board the ship for anything more than the freight upon the quantity actually shipped and brought home. But it appears to me that there is evidence to shew that the charterparty was entered into by their agents on their behalf. The Appellants were really the charterers; and, therefore, although as indorsees of the bills of lading merely, they

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they would not be bound by the stipulation as to lien in the charterparty, yet as the real charterers it is binding upon them.

I am of opinion that the interlocutors appealed from must be affirmed.

Lord Westbury:—

Two questions were argued at the Bar. First, what is the meaning of the term "dead freight" in respect of the remedy which it gives the shipowner? Does it entitle him to say that the deficient quantity shall be paid for at the rate assigned per ton in the charterparty. I think that that would be a very unreasonable interpretation; for if the full freight had been furnished to the captain, the charge for loading and the other outlays attendant upon the additional 210 tons which were wanting, would have occasioned some expenditure to the shipowner. The result, therefore, is, that in a charterparty giving no specific sum as the amount to be recovered by way of compensation for dead freight, the shipowner becomes entitled only to a reasonable sum—which is another phrase for unliquidated damages.

The next question is, whether considerations of convenience would prevent the shipowner from having a lien upon the cargo, seeing that he would become entitled to retain it during the time occupied in ascertaining the amount of the unliquidated damages. There may be some inconvenience in that construction, but that ought to have been considered by the parties when they entered into this express stipulation. I think it is impossible to set up any consideration of inconvenience in answer to the clear terms of the contract.

There remains but one further point, and that is, whether the shipowner has a right in respect of dead freight, and the damage pertaining to it, as against an indorsee of the bill of lading for valuable consideration? Now that has been examined specially by my noble and learned friend who has just sat down; and I agree with him that, substantially, the present Appellants are not only indorsees of the bill of lading, but that in reality they were bound as the persons who originally authorized the chartering of the ship, and who remained entitled to the benefit of that charterparty, and were therefore subject to the obligations contained in it.

The result is, that their title under the bill of lading is controlled by their liability under the charterparty.

I am of opinion, therefore, that there is no foundation for the appeal, and that it ought to be dismissed with costs.

LORD COLONSAY:—

My Lords, there are here two actions—one at the instance of the Appellants against the Respondent, and another at the instance of the Respondent against the Appellants. Both of them arise out of the charterparty, which may be generally stated to be a charterparty for taking on board quantities of bones amounting to a full cargo, to be delivered at some port in the *United Kingdom*. Bones were taken on board, and the vessel did arrive at *Aberdeen*, but while it appears from the charterparty that the vessel was a vessel of 596 tons measurement, it appears that the quantity of bones brought by her to *Aberdeen* amounted only to 386 tons. The vessel was described in the charterparty as of 596 tons registered measurement, and the evidence shewed that she was capable of carrying a good deal more. It appeared then that she had not on board goods to the amount of a full cargo, although when the bones were put on board bills of lading had been signed, indicating that she had actually shipped 701 tons. A peculiar state of circumstances arose. On the one hand the Appellants declined to pay the balance of the freight of the 386 tons in respect that there was a disappearance of part of the quantity of bones which the bills of lading bore to have been shipped, and they demanded the delivery of the whole quantity. On the other hand the shipmaster refused to deliver up any of the bones until he obtained payment of the balance of freight due upon the 386 tons, and also till he obtained what he described as "dead freight," which he said should amount to freight at the stipulated rate for at least 210 tons, being the difference between the registered measurement of the vessel and the amount of the cargo on board.

In this state of circumstances the consignees of the cargo brought an action to enforce their rights to obtain the full quantity of bones, or to obtain damages in respect of the deficiency. On the other hand, the owners of the vessel brought an action con-

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cluding to have it found that they were entitled to freight for the 386 tons, and that they were entitled also to "dead freight" at the same rate for 210 tons, and also to a sum for demurrage.

The point as to the right of the Appellants to refuse payment of freight until they obtained the delivery of the full quantity of bones which they alleged to have been put on board, turned upon the question of fact, whether the bones had been actually shipped. The bills of lading bore that the quantity shipped was 701 tons, and they insisted that upon the face of the bills of lading they were entitled to maintain that the full quantity had been put on board. It was held, that, although bills of lading might be *primâ facie* evidence, they were not conclusive; and that inquiry ought to be made into the facts of the case. That inquiry took place, and the result is before your Lordships. You are all of opinion that the result of the evidence is that the full quantity of bones had not been shipped.

Now in respect to the claim of the shipowner for the freight of the 386 tons, that was not seriously disputed. The important question in regard to his claim was, whether he was entitled to dead freight. An argument was maintained in the Court below to the effect, in the first place, that no payment for dead freight was due because the full cargo had been actually put on board. But that argument is displaced by the evidence. Then it was maintained that the Appellants were not liable for dead freight, inasmuch as they were not the charterers of the vessel. The Court below decided against them upon that point. When the case came up here it was maintained (as I understood the Lord Advocate) that under this charterparty there could be no such thing as a claim for "dead freight," there having been no stipulation for "dead freight;" and further, that, even supposing there could, under this charterparty, be a claim for dead freight, there was at all events no lien for dead freight.

As to the Appellants not being liable in respect they were not the charterers, I think the argument for the Respondents is conclusive. It is alleged on the record that *Whitaker & Co.* were the agents; and it is sufficiently evident, I think, from the documents that they, as such agents, chartered the vessel.

But then the two other questions remain: whether, under this

charterparty there is any claim for dead freight at all; and if there be a claim for dead freight, whether there is a right of lien on the cargo. Now, I cannot find the slightest difficulty in holding that, under such a charterparty as this, there is a claim for dead freight. We were told that "dead freight" was here an inaccurate expression, that it could not apply where there is merely an obligation to furnish a full cargo, and that in the case of failure to furnish a full cargo the claim must be for damages, and not for "dead freight," or freight of any kind. Now, the term "dead freight" may not be a very happy expression, but it is the only expression we have for the claim which arises in consequence of the failure to furnish a full cargo. It is so described in the English authorities, and also in the Scotch. Professor *Bell* so represents it in his 'Commentaries' (1), and also in his 'Principles' (2), and we find it in the 'Law Dictionary' (3). It is a name which has obtained a place in our mercantile language as well as in our law authorities. Now in this charterparty there was an obligation to load a full cargo, and that obligation was not fulfilled. Hence arises this claim, which is made out by the subsequent proofs in the case. But there is still the important question whether, in respect of this claim for dead freight, there is a right of lien. There may be a claim for dead freight where there is no right of lien. I think it is clear that where there is merely a failure to fulfil an obligation to furnish a full cargo, there is a claim for dead freight, but no right of lien. On the other hand I think it is equally clear, both on principle and on authority, that if there be a stipulation in the charterparty that dead freight shall be exigible, and that there shall be a lien for it on the cargo, then there is a lien constituted by contract. Lien is not properly a contract in the strictest sense of the law, because lien is more properly a right which the law gives without contract, but it may be constituted by contract. On that point we have abundant authorities, especially Mr. *Bell*, to whom I have referred. Whether it be a lien arising out of the usages of trade, or out of express stipulation, it is all the same. I adopt the words of Sir *William Grant* in the case of *Gladstone* v. *Birley* (4), where he says: "Taken either way,

(1) Vol. i. p. 430.
(2) Sect. 430.
(3) Page 254.
(4) 2 Mer. 401.

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however, the question always is whether there be a right to retain goods till a given demand is satisfied. That right must arise from law or contract." The question is, whether any such right exists here. This charterparty says, in so many words, that there shall be a lien for dead freight; that is the contract. We are told that those words are in print, and not in manuscript; I do not think that affects the question. The words being in print were allowed to remain, and the stipulation is a very natural and reasonable one. It is quite plain that the words are introduced there so as to be applicable to the case which does happen, not unfrequently, that there is a stipulation for dead freight; and that being so, and the contract being so expressed, I can entertain no doubt that it is a valid contract. The circumstance that the precise amount is not specified does not affect the principle. In almost any case that might happen, some inquiry might be necessary as to the amount of the dead freight. It might be alleged, on the part of the charterers, that other goods were received; or it might be alleged that certain things must be deducted, and so forth—but still the contract is there. It may be inconvenient, or not, that it should receive effect, but still there it is, and it is binding on the parties. But in this case I see no inconvenience or difficulty at all. It was not urged in the Court below, that the claim made as for 210 tons was an exorbitant claim, or a claim which ought to be subject to any deduction. It is clear, upon the evidence, that the vessel was capable of carrying a great deal more, and there is no allegation that from that anything ought to be deducted.

I therefore think, upon the whole aspect of the case, that the judgment of the Court below was right, and that this appeal should be dismissed.

Interlocutors affirmed; and appeal dismissed with costs (1).

Solicitors for the Appellants: *Simson & Wakeford.*
Solicitors for the Respondents: *R. W. & H. P. Sharp.*

(1) See *Gray* v. *Carr*, Law Rep. 6 Q. B. (Ex. Ch.) 522, June 15, 1871.

THE EARL OF PERTH . . . . . APPELLANT; 1871
LORD ELPHINSTONE, *et al.* . . . . . RESPONDENTS. *June* 19.

Treason—Attainder—Forfeiture.

Under a strict entail, *duly recorded*, the possessor's attainder for high treason affects only himself and the heirs of his body; leaving substitutes untouched.

But under any entail, *not duly recorded*, the possessor's attainder for high treason vests the estate in the Crown absolutely out and out, the interests of substitutes perishing. These consequences will arise, although the attainted possessor may have made up no title, and is merely in apparency; the estate vesting in the Crown at once and completely by virtue of its supereminent title.

THE Appellant, in 1853, was relieved from ancestral attainders and authorized to assume the Earldom of *Perth* by a statute (1) which, however, gave him no claim to the forfeited estates now and for nearly a century vested in the grantees of the Crown; whose title deeds and muniments he sought by the present suit to have produced and set aside, in order that with the restored peerage he might also enjoy the great feudal property which for ages had accompanied it.

In the statute of the 5 Anne, c. 8, "for the Union of *England* and *Scotland*," there was a proviso that each kingdom should retain its own laws. But two years afterwards, by the 7 Anne, c. 20, in order "to improve the Union," it was enacted that from and after the 1st of July, 1709, no offence should be deemed high treason in *Scotland* unless liable to be so regarded by the laws of *England* (2).

The Earl of *Perth* mainly relied on a deed of entail executed by *James Drummond* fourth Earl of *Perth*, on the 11th of October, 1687; whereby the *Perth* estates were strictly entailed, with prohibitory,

(1) 16 & 17 Vict. c. 115; see 1 Macq. Rep. p. 776. Moved by Lord *Lyndhurst's* eloquent oration, the bill was passed after the inquiry in the House of Lords which proved the claimant's pedigree; and established to the satisfaction of the Queen his claim to be restored, not only to the Earldom of *Perth*, but also to the Earldom of *Melfort*.

(2) For the laws of *England* as to high treason, see 1 Hale, P. C., p. 239, and Chitty, Crim. Law, vol. i. p. 727.

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irritant, and resolutive clauses, "to and in favour of the heirs male of his body; whom failing, to his other heirs male whatsoever; whom all failing, to his own heirs and assignees whomsoever."

This deed was not recorded in the register of tailzies, and therefore the chief question which arose was whether the entail came within the provisions of the Statute of 1690, c. 33, protecting substitute heirs from the consequences of treason by their predecessors.

Under this entail the *Perth* estates were possessed in 1720 by *James Drummond*, who assumed the title of duke, which had been, somewhat doubtfully, conferred upon his grandfather. *James*, this third Duke of *Perth*, with his brother Lord *John Drummond*, engaged as supporters of Prince *Charles* in the Rebellion of 1745. By an Act of Attainder, the 19 Geo. 2, c. 26, they were required to surrender on or before the 12th of July, 1746. The Duke died on the 11th of May, 1746, and Lord *John* on the 28th of September, 1747, both without issue. Neither having surrendered within the appointed time, they stood attainted of high treason; and the *Perth* estates, forfeited to the Crown, were instantly seized by order of the Scottish Exchequer, under the *Vesting Act*, 20 Geo. 2, c. 41. By the *Annexing Act*, 25 Geo. 2, c. 41, they were annexed to the imperial crown of the realm, and placed under the charge of commissioners.

In 1784, the statute of the 24 Geo. 3, c. 57, commonly called the *Restoration Act*, enabled His Majesty to grant to the heirs of former proprietors, upon certain terms and conditions, their forfeited estates in *Scotland*. And in pursuance of that statute a charter of the *Perth* estates was granted by the Crown on the 30th of August, 1785, to Captain *John Drummond*, *in fee simple*, as the nearest collateral heir male of the attainted *John* Lord *Drummond*.

Captain *Drummond*, in 1797, was created a British peer, under the title of Lord *Perth*, Baron *Drummond*, of *Stobhall*. He died in 1800, survived by his daughter, the Hon. *Clementina Sarah Drummond*, who expede a service as heir in special to her father, and thereafter was infeft. Having married Lord *Willoughby D'Eresby*, she, with her husband's consent, in 1862, conveyed the *Perth* estates to trustees (the above Respondents), and died on the 22nd of February, 1865.

The present action was commenced by the Appellant, the Earl of *Perth*, as "nearest lawful heir male in general to *James Drummond*, third Duke of *Perth*, "conformably to a decree of general service expede on the 22nd, and recorded and extracted on the 26th of February, 1866."

The trustees of Lady *Willoughby D'Eresby*, and other parties interested, were called as Defenders.

The Earl of *Perth* insisted that, as the nearest heir male of the third Duke of *Perth*, he was entitled to the estates as *in hæreditate jacente* of his Grace; no valid title having been completed by any one since his death. The Earl further insisted that the said estates could not have been lawfully forfeited to the Crown. And he also contended that he was the only person entitled to the benefit of the *Restoration Act.*

The Defenders objected to the production sought; and stated other answers to the Earl's case, which are fully set out and commented upon in the opinions of the Peers.

On the 12th of December, 1868, the Lord Ordinary (1) "repelled the Defenders' objections against satisfying the production." But on a reclaiming note the Second Division altered the Lord Ordinary's interlocutor, and on the 22nd of January, 1869, gave judgment as follows:—

Find that the lands and estates claimed by the Pursuer were taken out of the *hæreditas jacens* of *James Drummond* (designed third Duke of *Perth*), by means of the attainder of *John Drummond*, apparent heir of the said *James Drummond*, and became vested in the Crown: Find that the said estates formed the subject of enactments under the statutes, 20 Geo. 2, c. 41, 25 Geo. 2, c. 41, and 24 Geo. 3, c. 57,—but that these statutes confer no right on the Pursuer in reference to the said lands and estates: Find that in these circumstances the Pursuer has no right or title to insist in the conclusions of the present action, and dismiss the same, and decern (2).

Against this judgment the Earl of *Perth* presented his appeal to the House of Lords, having for his Counsel the *Dean of Faculty* (3), Mr. *Pearson*, Q.C., Mr. *F. Turner*, and Mr. *J. Shiress Will.* Their leading contention was that the 7 Anne, c. 20, having placed English and Scotch entails on the same footing with refer-

(1) Lord *Barcaple.*
(2) See the Third Series, vol. vii. p. 651, containing a full deduction of the title.
(3) Mr. *Gordon*, Q.C.

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ence to forfeiture; it followed that the remainder or substitution in the Earl of *Perth's* favour must have effect, Lord Chancellor *Hardwicke,* in the case of *Gordon of Park* (1), having declared, with the concurrence of the Judges, that "the heir of tailzie in *Scotland* forfeits by his attainder the same interest as tenant in tail in *England,* the Crown taking the lands during his lifetime and while there exists issue who would take by descent through him, but *leaving other substitutes in the entail unaffected*" (2). That the entail of 1687 was unrecorded did not affect the question of treason, although very material as to creditors. The entail was nevertheless binding *inter hæredes.* Circumstanced as Lord *John Drummond* was, in mere apparency, he could not have altered the order of succession, nor forfeited the estates to the Crown, which ought to have regranted the property to the heirs under the entail, and not to Captain *Drummond.* As to the long possession relied upon by the Respondents it had here no *primâ facie* title.

On behalf of the Respondents *The Lord Advocate* (3), Sir *Roundell Palmer,* Q.C., and Mr. *A. Burns Shand,* appeared; their successful arguments being sufficiently adverted to in the following opinions.

THE LORD CHANCELLOR (4):—

My Lords, it is conceded that until the year 1690 forfeiture for treason of an estate tailzie in *Scotland* included limitations to heirs male, or to heirs general, or indeed to third persons being substitutes and coming after the original institute. Those estates, under any circumstances, whether the tailzie was registered or not, would have been forfeited by the attainder of the actual holder. But in the year 1690 a statute (5) was passed, enacting that only the interest of the holder himself, if the estate were forfeited, should be dealt with, and that the estate tail should not be swept away *in toto,* but should pass on according to the destination. But there was a proviso in the Act that it was only to apply where the

(1) 1 Paton, 565; Morr. p. 4728; *Sandford* on Entails, 177.

(2) Lord *Campbell's* Lives of Lord Chancellors, vol. v. p. 61.

(3) Mr. *Young,* Q.C.

(4) Lord *Hatherley.*

(5) The Scotch Act, 1690, c. 33.

entail was duly registered. That being so, the case as regards Lord *John Drummond* would appear to be entirely out of the Act of 1690.

The question, however, has now been mainly rested upon the British Act passed after the union of *England* and *Scotland*—the 7 Anne, c. 20. That Act recites the expediency of making uniform the law of treason in the two countries. To the end, therefore, that "the Union might be improved," it enacted, that from and after the 1st of July, 1709, "such crimes and offences as were high treason, or misprision of high treason, in *England*, should be construed to be so in *Scotland*, and none other."

The case of *Gordon of Park* (1), chiefly relied upon by the present Appellant, was brought before your Lordships' House under circumstances which rendered it necessary to apply to it the Act of the 7 Anne. The estate there stood limited to Sir *William Gordon* and the heirs male of his body, whom failing, not to his next heir male, but to the heirs of the body of the original settlor. And the Courts in *Scotland* held that, by virtue of the statute of 1690, c. 33, the estate of Sir *William Gordon*, which had been forfeited, would have passed over at once to his issue if he had had any, and that, those failing, it would go over as in remainder to the remainder-man who was then claiming as the heir of Sir *William*, the original settlor.

The argument wholly arises from the attempt to make a full and complete analogy between cases which really do not admit of that full and complete analogy, regard being had to the difference between the two laws. But as far as the analogy can really in any way be pursued, the argument is wholly the other way from that in which it has been put on behalf of the Appellant; because the estate vested in Lord *John Drummond* upon the failure of his issue male was really a larger estate, and one more completely vested in him, and giving him more complete control. If the English law allowed any such limitation, which it does not (and hence arises the difficulty in making a comparison) it would have been a full and complete fee simple in the first taker, but a fee simple with the choice of heirs—which the law does not admit.

Now I take it that the whole principle of the English law is, that those who take through the first taker as his issue in tail by

(1) 1 Paton, 565; Morr. p. 4728; *Sandford* on Entails, 177.

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a qualified heirship, directly next in blood to him, shall be held to be affected by the forfeiture which has accrued to the ancestor.

It appears to me that the full right of the Crown to the forfeiture, which existed by the statute of 1690, continued to exist after that Act with regard to this particular estate, because the entail of the property was not registered, and is in no way struck at by the Act of 7 Anne, c. 20, and that in order to affect it you would have to shew that by the English law such an estate as we have before us here would not have been forfeited. But the difficulty is, that no such estate exists in the English law, and if no such estate exists in the English law, I apprehend that the Scottish law would prevail where the object is to make the two laws of forfeiture coincident. You find that the English law forfeits an estate which is less than this, and that it forfeits the fee simple of an estate which is greater than this. Here is an intermediate estate in *Scotland*, and I think that it involves no clashing between anything which is done by the law of *Scotland* and by the law of *England*, to say that the law of *England*, which strikes at an estate of a more limited nature, an estate of a more extended nature, cannot be so applied as to prevent the law of *Scotland* from operating upon an intermediate estate, which is permitted by the law of *Scotland*. The Act of Queen *Anne* does not attempt to assimilate the dispositions in *Scotland* and the dispositions in *England*, with reference to the destination of estates, but it says: Whenever punishment is to fall, let the principle be equality of punishment in the two countries. It cannot, I apprehend, be said to militate in any way against that law if you say, that finding a lesser estate forfeited in *Scotland*, and finding a greater estate forfeited in *England*, the intermediate estate, which is something more than that smaller estate which would be forfeited, though it is something less than the larger estate which gives a complete disposition of the property, is also forfeited. That would appear to be on the principle of the 7 Anne, c. 20, and not to be extending the law of forfeiture in one country beyond the law of forfeiture which exists in the other.

Then, my Lords, if the estate was forfeited, there is no doubt that it was vested in the Crown. If it was vested in the Crown, there is no doubt that there was a power in the Crown to deal

with it in the manner provided by the *Restoring Act*. That *Restoring Act* appears to have been an Act for the express purpose of giving back forfeited estates, even where they had been settled by deeds creating tailzies, or in any other way. The object of the Act was to restore the estate to the person who filled at the time the character of the person who would be entitled under the destination. But in restoring it to that person it seems to me to have been clearly and distinctly the principle of the Act to give it to him in fee.

The *hæreditas jacens* having been in *James Drummond*, and having passed over to *John*, it appears to me that, in consonance with the 7th of *Anne*, it passed into the possession of the Crown. That possession of the Crown was afterwards divested by the Act of the Crown itself. And I apprehend, upon two grounds, the Appellant cannot succeed. First, that claiming this property as part of the *hæreditas jacens* he cannot succeed in consequence of its having passed over to *John Drummond*. And, secondly, inasmuch as this is not a procedure by which a grant actually made by the Crown can be repealed, we find that the estates really passed to *John Drummond*, and from him to the Crown.

The Appellant asserts that he is entitled to recover in this suit, and to have production of the documents called for by him, in order that he may further proceed with the case; but his right to that production has not been established before us; and, therefore, I am of opinion that the interlocutor of the Court below should be affirmed, and that this appeal must be dismissed with costs.

LORD CHELMSFORD:—

In this action the Pursuer is bound to shew a sufficient title before he can call upon the Defenders for production of the documents sought to be reduced. It is a preliminary proceeding, which can be met only by an objection to the Pursuer's title as stated by him upon the record, or by some other valid preliminary defence. If a sufficient *primâ facie* title to the production is shewn by the Pursuer, the Defender can urge nothing in answer; although on the merits he may afterwards establish a complete defence to the Pursuer's claim.

The Lord Ordinary was of opinion that the Pursuer had libelled

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at least a *primâ facie* title; the service as heir male to *James Drummond* founded upon, being the proper and conclusive legal evidence that he possessed the character which he claimed. But upon a reclaiming note the interlocutor of the Lord Ordinary was recalled, and the interlocutor appealed from was pronounced, whereby it was found that the Pursuer had no right or title to insist on the conclusions in the action, for that the lands and estates claimed by the Pursuer, and all rights connected therewith, were taken out of the *hæreditas jacens* of *James Drummond* (designed third Duke of *Perth*) by means of the attainder of *John Drummond*, apparent heir of the said *James Drummond*, and that the same became vested in the Crown.

The foundation of the Appellant's title is laid in a deed of entail dated the 11th of October, 1687, executed by *James*, the fourth Earl of *Perth*, Chancellor of *Scotland*, fenced by prohibitory, irritant, and resolutive clauses, whereby under a reservation of his own life rent (to which the fetters imposed did not apply) he disponed his lands and estates of *Perth* to and in favour of his eldest son *James* Lord *Drummond* and the heirs male of his body, whom failing, to his other heirs male whatsoever, whom failing, to his other heirs and assignees.

Under this entail a title was completed by a Crown charter of resignation, and *novodamus*, upon which infeftment followed in his favour. But the deed of entail was never recorded in the register of tailzies.

In 1713, *James*, the institute, executed a disposition (reserving his own life rent) in favour of his eldest son *James* Lord *Drummond* and the heirs male of his body, whom failing, to his other heirs whatsoever.

In 1731, *James* Lord *Drummond*, styled third Duke of *Perth*, expede a Crown charter of resignation and confirmation in favour of himself and the heirs male of his body, whom failing, to his other heirs male whatsoever, whom failing, to his heirs and assignees.

Thus stood the title at the death of *James* Lord *Drummond* in May, 1746, and at the time of the attainder of his brother and heir, Lord *John Drummond*, on the 12th of July, 1746, which, by the Act of attainder passed in the same year (1), took effect from the

(1) 19 Geo. 2, c. 26.

previous 18th of April. Whatever estate and interest Lord *John Drummond* had in the *Perth* estates at the time of his attainder was vested in the Crown by the *Vesting Act* (1), passed in 1747; and was annexed inalienably to the Crown by the *Annexing Act* (2), passed in 1752. Lord *John Drummond* on the 12th of July, 1746, had not made up his titles as heir to his brother *James*, but there is no doubt (and this was admitted by the Appellant) that whatever estate and interest Lord *John Drummond* possessed in the *Perth* estates as heir apparent was forfeited in the same manner, or to the same extent, as if he had completed his feudal title.

James Lord *Drummond* undoubtedly died in the fee of the estates; and if Lord *John* had made up his titles as heir to his brother, which he must have done, as he was the last person infeft, the service would have carried everything which was *in hæreditate jacente* of *James;* and consequently by the attainder of Lord *John* the fee must have been forfeited to the Crown.

Before any statute existed on the subject, a substitute in a Scotch entail had no protection against a forfeiture of the estates of a tenant in tail for high treason. The Act of 1685, cap. 22, merely protected a substitute against the voluntary deeds of the tenant in tail, and had no effect in securing him against the forfeiture of the estate to the Crown. Indeed, it expressly declares that nothing in the Act shall prejudge His Majesty as to confiscations, or other fines, as the punishment of crimes. This latter clause was repealed by the Act of 1690, which enacted that no heirs of entail in infeftments or other deeds affected with prohibitive or irritant clauses should be prejudged by the forfeiture of his predecessor, provided the right of tailzie were registrate conformably to the Act of 1685.

But the Appellant contends that the statute, 7 Anne, c. 20, which virtually repealed the Act of 1690, and made high treason and the liability to forfeitures consequent upon it the same in *Scotland* as in *England*, placed the substitute in a Scotch entail in an analogous position to that of a remainderman after an estate tail in *England*, and, therefore, secured him against the forfeiture of the estates by the tenant in tail; and that this analogy existed whether the entail was recorded or not. It is to be observed that

(1) 20 Geo. 2, c. 41. (2) 25 Geo. 2, c. 41.

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the statute says nothing as to the forfeiture, except as it affects the persons convicted or attainted of treason, and the exception of heirs of entail committing treason before the 1st of July, 1709, is only to save them the benefit of the Act of 1690.

There can be no perfect analogy between a substitute in a Scotch entail and a remainderman in an English entail, but to assimilate the substitute as nearly as may be to the remainderman, the Scotch entail must be a strict entail within the Act of 1685, and consequently one that is recorded in the register of tailzies.

The Appellant relied strongly upon the case of *Gordon of Park* (1), where Sir *James Gordon* executed a procuratory of resignation of his barony of *Park* for new infeftment to himself, and after his decease to *William Gordon*, his eldest son, and the heirs of his body, whom failing, to the heirs male of Sir *James's* own body of his then present or of any subsequent marriage, with other substitutions. A charter from the Crown and seisin proceeded upon this procuratory, on which, as well as on the procuratory itself, prohibitory and irritant clauses were engrossed. *William* succeeded his father, and was forfeited for his accession to the Rebellion in 1745, and the estate was seized for the Crown. As Sir *William Gordon* had no children the estate was claimed by his brother, Captain *John Gordon*, as the next heir of entail. The House of Lords, reversing a decree of the Court of Session, held that by virtue of the statute 7 Anne, the estate became forfeited to the Crown by *William Gordon's* attainder during his life, and the continuance of such issue male of his body as would have been inheritable to the estate in case he had not been attainted, and that by virtue of the substitution to the heirs male of Sir *James Gordon's* body of his then present marriage, Captain *Gordon* had right to succeed to the barony of *Park* after the death of Sir *William* and failure of the issue of his body, according to the limitations in the settlement. Lord *Kames*, in his 'Elucidations' (2), observes that "by this judgment a remainder with respect to forfeiture is introduced into our law hitherto unknown in *Scotland*." There can be no doubt that the tailzie in the case of *Gordon of Park* was a complete and registered tailzie, according to

(1) 1 Paton, 565; Morr. p. 4728; *Sandford* on Entails, 177.
(2) Page 371.

the Act of 1685, because Baron *Hume*, in his 'Commentaries' (1), after stating that by the judgment in this case the interest of the next order or class of substitutes was to be viewed as a new acquisition or separate estate from that of the offender and his issue male, adds these observations: "Even this limitation of the forfeiture does, however, only apply in the case of such tailzies as are duly completed by entry on record in terms of the Statute, 1685. For this circumstance is an indispensable qualification for taking the estate out of the case of a fee simple, which, as the possessor may effectually alienate or encumber by his deed, so must it absolutely and entirely forfeit by his crime."

In the case of *Kinloch* v. *The King's Advocate* (2) which was decided only two months after that of *Gordon of Park*, on a substitute claiming the estate after the death of the heir, who had been attainted for engaging in the Rebellion of 1745, the Court found "that the tailzie upon the estate of *Kinloch* not being registered in terms of the Act of Parliament, 1685, no claim could be sustained thereon." And the claim of a substitute after an attainder was again dismissed on the subsequent case of *Hay* v. *The King's Advocate* (3), where the want of registration was one of the objections stated on behalf of the Crown.

As the deed of entail of 1687 was not registered, *James* Lord *Drummond* would have a right to alienate the estate, and Lord *John*, upon the completion of his title as heir to his brother, would have succeeded to all that had been previously enjoyed, and would have had the same right of alienation. Therefore, on his attainder, the entire fee was forfeited to the Crown, and there was nothing left in the *hæreditas jacens* of *James* Lord *Drummond* upon which the Appellant's service as heir to him could operate.

I might end here, but perhaps it would not be right not to make some observations upon the Appellant's case, arising upon the *Vesting* and *Restoring Acts*. I may observe that the objection to the service of the Appellant as heir male to *James* Lord *Drummond*, on the ground that he was compelled to derive title from two attainted persons—*James* second Duke of *Perth*, attainted in 1715, and *John* Duc *de Melfort*, attainted in 1695—appears to me

(1) Pages 546, 547. (2) Mor. Dict. 15,388.
(3) Mor. Dict. 15,602.

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not to be competent to the Respondents in the present proceeding. Whether it would be a ground for reduction of the service it is unnecessary to consider; but I apprehend in this action the service must be taken as a good service of the Appellant as heir, and that the only question is what title to enforce production it gave him.

The foundation of the Appellant's claim is laid upon the ground that the Act of 7 Anne placed a substitute in the position of a remainderman in an English entail, and so protected him against the forfeiture of the tenant in tail for treason. And he contends that the *Vesting Act*, 20 Geo. 2, c. 41, vested only the lands and heritages which the attainted persons were seised or possessed of, or interested in or entitled to, according to their several and respective estates and interests; that Lord *John Drummond* had only the estate and interest of *James* Lord *Drummond*, which was distinct from that of the substitute in the entail of 1687; and that the *Restoring Act* of 24 Geo. 3, c. 57, gave the Crown the power to restore the forfeited estates to the heirs and families of the attainted persons; and that the clause of the Act relating to the estates of *Perth* must be understood as restoring them to the limitations of the settlement of 1687. The power given to the Crown by the 10th section of the Act is to give and dispone to the heir male of Lord *John Drummond*, and to the heirs and assigns of such heir male.

A good deal of discussion took place as to whether the words were "heirs male" in the plural, or "heir male" in the singular, it appearing that there were copies of the Act in which the plural was found, and the Parliament Roll having, apparently, the final "s" erased. But whatever is the actual state of this roll, it is the decisive authority upon this subject, and cannot be averred against. The Appellant insisted that "heir male" was *nomen collectivum*, and therefore that the clause would have the same effect if read either way. But I think there can be no doubt that the intention was to give the estates to the person who at the time was the heir male of Lord *John Drummond*, and to his heirs and assigns. It seems to me impossible to read the clause in any other way. It recites that Lord *John Drummond* died without leaving issue lawful of his body, and it is not yet ascertained who is his nearest collateral heir male; and it then gives and dispones to the heir

male of the said *John Drummond* (clearly as a *descriptio personæ*), as to the heirs and assigns of *such* heir male. And the intention to give the fee to the heir male, when found, appears to be clear from the other sections of the Act, in which the forfeited estates are given to the son or the grandson of the attainted person, and his heirs and assigns. And particularly from the 11th section, in which it is recited that part of the forfeited estates were devised to heirs general and part to heirs male, and the part devised to heirs male is given to the heir male by name of the forfeiting person, his heirs and assigns.

Of course the argument of the Appellant has not the slightest foundation to rest upon, if (as has been already shewn) the fee of the *Perth* estates was forfeited by Lord *John Drummond's* attainder, and was vested in the Crown. But even if he were right in his view of the limited character of the forfeiture, he could not, in my opinion, be successful in his contention that the Crown exceeded its powers by granting the forfeited estates in fee. The estates of the attainted person were, by the Act 20 Geo. 2, c. 41, vested in the Crown, and a register of the forfeited estates was to be kept. And to prevent any person having any estate, right, title, or interest into or out of any of the forfeited estates being prejudiced, he was to be at liberty, within six months of the entry on the register, to enter a claim or demand; and in default, every such estate, right, title, interest, use, possession, reversion, or remainder, &c., &c., was to be null and void to all intents and purposes, and the estate was to be from thence freed, acquitted, and discharged of and from the same. No claim was made within the time prescribed, and, therefore, by the 19th section, the estates in question were, against all persons, and to all intents and purposes, vested absolutely in the Crown by virtue of the Act.

The Appellant, to shew that the Crown had exceeded its power in granting the *Perth* estates in fee, relied upon the words of the preamble of the *Restoring Act:* "It is expedient that the estates be restored to the heirs and families of the former owners;" which, he contended, compelled the Crown to return the estates to the old limitations of the entail of 1687. Whatever restrictive effect these words may have, a preamble can never control the enacting part of a statute, although it may sometimes serve to explain it.

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But the 10th section so clearly empowers the Crown to grant the estates to the heir male of Lord *John Drummond* in fee, that it excludes all question about its meaning.

I have entered, perhaps at unnecessary length, into the questions submitted to your Lordships upon this appeal. I have done so because I have felt the great importance of these questions; and I have been anxious to shew that the conclusion at which I have arrived is the result of a careful consideration of the case from every point of view in which it has been presented.

I agree that the interlocutor appealed from must be affirmed, and the appeal dismissed with costs.

LORD WESTBURY:—

I quite agree that on the present proceeding the title of the Appellant, as heir male in general to *James* third Duke of *Perth*, cannot be contradicted; and I hold that it is quite impossible to enter into any question of corruption of blood by attainder for the purpose of disputing the effect of the service. I also agree that the Appellant will be entitled to production of titles, unless it be clear from his own statement that he has no right in the estates to which he alleges he would be entitled in respect of the service.

It is important, therefore, to consider what was the state of things at the time of the attainder of Lord *John Drummond*. Now *James Drummond*, who is styled third Duke of *Perth*, died on the 11th of May, 1746. As that was before the day in July, 1746, limited by the Act of 1746 for attainted persons to come in, *James* third Duke of *Perth* died before the attainder; and it is clear that upon his death the succession was in favour of his brother, Lord *John Drummond*. But what was that succession? My Lords, the estate at that time was held by *James* third Duke of *Perth* as heir of the body of his father, *James*, under the deed of 1687. The destination in that deed was to the son of the settlor, *James* Lord *Drummond* (the father of *James* the third Duke of *Perth*), and to the heirs male of his body, whom failing, to the other heirs male of *James* Lord *Drummond*. Now both *James* the third Duke of *Perth*, and Lord *John Drummond*, his brother, were heirs male of the body of their father, *James*; and on the death of *James*, the third Duke, the succession opened in

favour of Lord *John*, his brother, who then became entitled as heir male of the body of *James*, the father. Then Lord *John Drummond* not having come in, became attainted.

Now the first, and undoubtedly the most important, question here is: What was the effect of the confiscation to the Crown consequent upon that attainder? Although the deed of 1687 was never recorded, and therefore was not a strict entail, yet it was good *inter hæredes*, and the result, therefore, was, that on the death of *James*, *John* became entitled under and by virtue of the destination in the deed. Although *John* was entitled only in apparency, yet upon his death the whole fee simple of the property passed to the Crown. That was the law of *Scotland*, as appears by the statutes and by the institutional writers anterior to the Act of 1690.

The Act of 1690 preserves from forfeiture only estates of substitutes under a strict entail duly recorded. Consequently it is affirmed that the forfeiture incurred by an heir under an unrecorded entail was a forfeiture of the whole estate which that heir had power to part with, by reason of his alienation not being effectually prohibited.

But then it is said, on the part of the Appellant, that the Crown never made up a title. It is, I think, clear that the Crown could not make up a title. It certainly was under no obligation to do so. The title of the Crown, as the *summus imperii*, became complete by virtue of its paramount title and its right of superiority in that capacity. Then what was the consequence? If the Crown took the whole estate which *John* could part with, and if the whole estate which *John* could part with was the fee simple, the Crown took the fee simple, and the result was, that there was no *hæreditas jacens* in *James* at all.

I hardly think that the effect of the fact that both *James* and *John* died without issue (*John* having died without issue in 1747) has had the full force given to it to which it is entitled, because by that event the destination to the heirs male of the body of *James*, the institute in the deed of tailzie of 1687, became defunct, and the substitution to the other heirs male of *James*, the institute in the entail, would, if there had been no forfeiture, have taken effect.

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Then I pass on to consider in a very few words the effect of the statutes. It is impossible to hold the language of those statutes to be consistent with any other conclusion than this, that the whole fee simple was by the Legislature, and by the framers of the statute, treated as vested in the Crown. It is unnecessary to go through the language of the *Vesting Act*, or of the *Annexing Act;* but I cannot at all accept the argument at the Bar, that they are controlled by the recitals, and that they, in point of fact, annexed to the Crown only that limited interest which, according to the Appellant's contention, is divested by the forfeiture and annexed to the Crown. The Appellant admits that there was taken out of the *hæreditas jacens* of *James* that which was legitimately forfeited; but he contends that the forfeiture could not by any possibility extend beyond the estate of *John* and the issue of his body; and that when that estate ceased by *John* dying without issue, the estate must be regarded as having come back to the Crown through its old channels under the deed of tailzie of 1687. That certainly is not the true construction of the *Act of Attainder;* and still less is it the construction which ought to be put upon the *Act of Restoration.*

The *Act of Restoration* has a special recital with reference to this estate, and it confers a power upon the Crown to give the estates, which it had obtained by forfeiture, to the collateral heir of Lord *John Drummond*, and to the heirs and assigns of that collateral heir. Says the Appellant, "The intention was to restore the estate to the former channel." If there had been any such intention, the Crown would have been authorized to give the estate to the person who was entitled at that time under the limitations to the heirs male general of *James*, the institute in the deed of 1687. But instead of that, the Crown is authorized, or directed, if you please, to give the estate to the heir of Lord *John Drummond*, the person who was attainted. And it is indisputable that that proceeded on the notion, which was I think the correct notion, that Lord *John* had, by his attainder, forfeited the fee simple to the Crown, and therefore Lord *John* is considered as the stock of descent to whom alone the Crown is to look in the restoration of the estates.

Now, my Lords, when the Act of 1690, c. 33, was virtually repealed by the 7th of Anne, c. 20, I do not think that it had any other effect than that of leaving the old Scotch law of forfeiture,

anterior to the Act of 1690, c. 33, in its original and pristine force. And, in reality, the decision which was come to in this House in the case of *Gordon of Park* was little better than an act of legislation, because it proceeded upon an assumed analogy between the heir of tailzie in *Scotland* under a properly fenced deed of tailzie, and an heir taking under a deed of entail in *England*. It is difficult to draw any such analogy, and there are incorrect expressions even in the language of Lord *Hardwicke* with regard to the meaning of the word "substitutes." It must undoubtedly be understood that when Lord *Hardwicke* meant to draw an analogy between the forfeiture of an estate tail in *England*, and the forfeiture of an estate tail in *Scotland*, he referred only to an entail which would have answered the requisites of the Act of 1690, c. 33, and which would have been a strict entail, with proper irritant, resolutive, and prohibitory clauses, and duly recorded under the Act of 1685.

Upon these grounds I have not the least hesitation in concurring with the noble and learned Lords who have already delivered their opinions in this case.

LORD COLONSAY:—

My Lords, this case is insisted in by the Appellant on the title derived from his service as heir male in general of *James Drummond*. That service is good to the effect of establishing the propinquity of the party to the person to whom he has served. I do not think that in this action we can deal with it on any more unfavourable footing, because he having gone through the regular course of procedure to obtain that service, it would not do, for us now to raise up, or to listen to objections, which, if they had been raised at the proper time, might have stopped the progress of that service, or imposed an impediment to the investigation in regard to that service. But it does not follow that that service entitles the Appellant to occupy the position of one who has got an estate, or a right to an estate, as having been at the time in the *hæreditas jacens* of *James Drummond*. He may have been served heir to a party in whom there was no such estate. And one question is, whether it appears on the statements of the Appellant himself on the record that there was such an estate in *James Drummond* at

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the time of that service. It appears to me very plain that there was not, and that there could not be, in *James Drummond* any such estate. *James Drummond* died in May, 1746, having been in possession of the estate—having had a title to it, and having been infeft in it. The estate then devolved on his brother *John*. *John* never made up a title. He had only the right of apparency; but he had all the rights and powers of that position.

That being so, the next question which arises is, What became of that estate which had devolved upon *John?* He possessed it in right of his apparency only; but he was attainted, and I apprehend that by his attainder, unless the terms of the deeds and writs under which he held it prevented such a result, the estate came to the Crown, albeit his right in the estate was only that of an heir apparent in possession. The law is laid down by all the authorities—that an estate held on the right of apparency is forfeited to the Crown in the case of treason. The Crown does not require the heir apparent to make up a title. He is in a position to make up a title if he chooses; but it is not necessary for the Crown, in order to the completion of its own title, to compel him to do so, as the forfeiture itself gives a title to the Crown—a supereminent title.

The next question comes to be, Whether the estate being held under a deed of entail, containing clauses prohibitory, irritant, and resolutive, but not recorded, the forfeiture carried more than the right of *John* himself and of the heirs of his body. He had no heirs of his body, and, therefore, the question is confined to the right of *John* himself.

Now the old law of *Scotland* was, that the whole estate of a traitor was forfeited out and out in perpetuity to the Crown by his act of treason. A limitation was put upon that by the Act of 1690; but the old law of *Scotland* was clear, and all the authorities concur with Baron *Hume* on that subject (1). Then what has altered that law? The Act of 1690 did so to this effect, that where there existed an estate held under an entail duly executed and recorded in terms of the Act 1685, the forfeiture did not go beyond the traitor's own estate or interest. But that law has undergone alteration, or, at least, modification, by the Act of

(1) Hume on Crimes, vol. i., p. 546.

7 Anne, c. 20. The measure of the alteration is a more difficult question. It is said, that by the judgment pronounced in the case of *Gordon of Park* a precedent is found for the contention now raised by the Appellant, that *John Drummond* could not forfeit anything beyond his own right and the rights of his own immediate descendants. It was assumed that the decision in the case of *Gordon of Park* could not have been influenced by the fact of the entail in that case being recorded; and that as there was here a deed of tailzie containing prohibitory, irritant, and resolutive clauses, which, though not recorded, was operative among heirs, and prevented the owner in possession of the estate from gratuitously disposing of it, or from burdening it, without liability to its being claimed and taken possession of by the next takers, the same principle applies as in the case of *Gordon*. Undoubtedly, in systematic treatises on the law by institutional writers, tailzies are divided into three classes, as was pointed out by the learned counsel at the Bar; but on the whole matter with which we are here dealing the question is, what is to be regarded as an entailed estate? An entailed estate, in ordinary language, means an estate held under a deed of entail, with prohibitory, irritant, and resolutive clauses *duly recorded in terms of the Act* 1685. It has been so interpreted in deeds of trust, where parties have been directed to acquire property and to entail it upon a certain series of heirs. It implies not merely a deed with prohibitory, irritant, and resolutive clauses, but a deed duly recorded so as to make it effectual. Then the fact here being that the party in possession held the estate under a tailzie, effectual, no doubt to a certain extent, as between heirs, but still in such an imperfect and incompleted condition that the estate might be taken away or put away from those heirs by his acts, by his contracting debt, or by an act of onerous alienation, it was not within the letter or the principle of the protection given by the Act of 1690, as construed in the case of *Gordon of Park*. The case of *Gordon of Park* cannot have been a decision or precedent in favour of the Appellant on this point, because in that case the entail was duly recorded. What was the course of decision in the case of *Gordon of Park?* The Court in *Scotland* had applied the Act of 1690 in a particular way —that is to say, they had decided that the estate was forfeited

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THE EARL OF PERTH v. LORD ELPHINSTONE.

only during Sir *William Gordon's* life, and by consequence that the protecting provisions of the Act were applicable to his descendants. But the judgment in the House of Lords was a judgment of reversal, and refusing to give such effect to the Act of 1690, and holding that in the given circumstances the forfeiture extended to Sir *William* and his issue male, but not to his brother. Then, how does that support the proposition that where the entail is not recorded, the same limitation of forfeiture must apply? Mr. *Hume*, the highest authority on the law of *Scotland* on such questions, says, in reference to the judgment in the case of *Gordon*, "Even this limitation of the forfeiture does however only apply in the case of such tailzies as are duly completed by entry on record in the terms of the statute 1685."

I was very desirous to hear the opinions of my noble and learned friends, as to the analogy between English entails and Scotch entails, especially when the Scotch entails are unrecorded, and have not full operative effect under the statute. And as I understand the principle of English law in that respect, as regards the effect and operation of entails, the analogy contended for by the Appellant does not hold in the case of an unrecorded entail. On these grounds I think that the service which the Appellant has obtained cannot give him a title to insist on the production of these writs and titles.

But he may have a title to insist on other grounds, and he claims to have such a title to insist. He says that by various statutes, the *Forfeiting Act*, the *Attainder Act*, the *Vesting Act*, the *Annexing Act*, and the *Restoring Act*, all taken together, it is clear that the intention of the Legislature was, and that the true construction of the *Restoring Act* was, that the estate should be restored, not to the Lord *Perth*, and his heirs and assigns, simply, but to the course of succession that was pointed out by the previous settlement of the estate.

So far as the argument is rested upon the proposition that the forfeiture could not carry more than the right which was in *John Drummond*, I have already disposed of it. But as regards a right under the statutes to get the estate upon the footing that the grant to Lord *Perth* was invalid as not in terms of or within the power of the Crown, that is quite a different contention. I

think it may be contended that, irrespectively of the question of the service carrying or not carrying the estate as having been in the *hæreditas jacens* of *James Drummond*, the fact of the Appellant having established his propinquity and his obvious interest would give him a title to insist in reference to this other view of the case. There are many cases in which the existence of an interest gives a title to insist, and if it be that the true construction of the Acts of Parliament is that the estate should have been given to Lord *Perth*, and to the heirs male, in conformity with the original investiture, or if Lord *Perth* should have so made up his title, this may be a case of that kind. But in the first place we must construe the Act of Parliament, and if the Act does not bear that construction, and if that is not the true meaning of the grant of the Crown, then I think it will require some other power to get rid of that Act of Parliament and to get at the result contended for. Now, seeing that the forfeiture was complete, and vested in the Crown all right to the estate, I have no doubt at all that the Crown by the *Restoring Act* had a right to restore it to whomsoever the Act directed it to be restored. And I have as little doubt, on the construction of that Act, that the authority given to the Crown, or the direction given to the Crown, was a direction to restore the estate to the person who should be found out to be the next heir male (for there was a doubt who was the then next heir male), and to his assigns, in fee simple.

On those grounds I think the judgment of the Court below was correct, and that this appeal ought to be dismissed with costs.

LORD CAIRNS:—

My Lords, every question which arises in this case has been so fully exhausted by the opinions delivered by my noble and learned friends, that I do not propose to do anything more than to say that I concur in the judgment proposed.

Interlocutors affirmed, and appeal dismissed with costs.

Solicitors for the Appellants: *Connell & Hope.*

Solicitors for the Respondents: *Loch & Maclaurin; Travers Smith & De Gex.*

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June 22.

THE CITY OF GLASGOW UNION RAILWAY COMPANY . . . . . } APPELLANTS;

THE CALEDONIAN RAILWAY COMPANY RESPONDENTS.

Railway Statutes—Clauses as to "Superfluous Lands" and as to Lands for "Extraordinary Purposes."

Lands taken compulsorily by the promoters of a railway, unless used or disposed of within the statutory period, are deemed "superfluous lands;" and as such vest in the adjoining owners. But this statutory rule has no application to lands acquired by voluntary agreement for "extraordinary purposes" arising incidentally.

The distinction is observable in the English as well as the Scottish enactments.

Per LORD WESTBURY:—We naturally expect that lands taken by compulsory powers, if not wanted by the railway, shall be restored. But the company is left to deal with lands which they have acquired by private treaty as any ordinary proprietor may do.

THE *Caledonian Railway Company* suing the Appellants for the price of certain lands, were met by the Appellants' defence that the lands in question had come within the category of "superfluous lands," under the 120th section of the *Lands Clauses Consolidation (Scotland) Act;* and that these lands not having been sold or disposed of within the statutory period had vested in the adjoining owner; so that the *Caledonian Railway Company* could not give a title to a purchaser, and therefore were precluded from demanding the price. To this the *Caledonian Railway Company* answered that the section of the Act relied upon by the Appellants applied only to lands taken *compulsorily;* whereas the lands in the present case had been acquired by voluntary agreement, coming within the operation of the enactment which authorizes railway companies from time to time to purchase and sell lands for "extraordinary purposes," to meet the exigencies of the line as occasions arise.

The Lord Ordinary (1) decided against the *Caledonian Railway Company;* holding the lands in question were "superfluous lands" within the meaning of the 120th section of the *Lands Clauses Consolidation (Scotland) Act,* and so had passed away from the vendors. The Lord Ordinary's interlocutor, however, was recalled

(1) Lord *Barcaple.*

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by the Second Division, Lord *Cowan* delivering the opinion of the Court to the following effect, in a judgment entirely approved of by the House:—

This was admitted at the Bar to be a new question, on which no light could be thrown by any decision of the English Courts, or of our own. The sale of superfluous lands, under the 120th section of the *Lands Clauses Consolidation (Scotland) Act*, must be effected within the prescribed period; otherwise the lands are forfeited by the company, and become the property of the adjoining heritors. The words, as well as the reason, of this very stringent and penal enactment appear to confine its operation to lands acquired under the compulsory powers conferred by the statute, whether by agreement with the owners, or under notices, as enacted by the 6th and 17th sections and other relative provisions. Although the acquisition of such lands may have been by private agreement, still, being lands within the compulsory powers, and which the owners on requisition of the company, *must* part with, they are certainly lands which, if not required for the purposes of the railway, must be held within the operation of the statutory enactment. But can the same be predicated of lands not acquired under the compulsory powers of the Act, but acquired by voluntary agreement and purchase for the extraordinary purposes specified. By the 38th section of the *Railways Clauses Act* it is declared lawful for a railway company, "in addition to the land authorized to be compulsorily taken by them under the powers of this or the special Act," to contract with any party willing to sell the same for the purchase of land adjoining or near to the railway, not exceeding the prescribed number of acres, "for extraordinary purposes." The purposes are then specified; and it is very material to observe that these purposes are of such a nature as require to be met from time to time during the subsistence of the railway. It is only after the undertaking has been in operation that the exigency may arise for the acquisition of lands to meet the shifting state of the traffic at the various stations and districts along the line. No limitation whatever is prescribed as to the period either for the purchase of lands for such "extraordinary purposes" or for their sale; no pre-emption right is conferred in reference to the sale of them when resolved on; on the contrary, the sale may be to any person, and the power to purchase, sell, re-purchase, and re-sell lands thus acquired is expressly permitted to be exercised "from time to time," that is, as I read it, at any time during the subsistence of the railway. Now, that the land here in question was acquired for "extraordinary purposes" is not doubtful from the statements in the record, the proof led by the parties, and the productions in process. The statutory provisions throughout draw a clear distinction between lands to be compulsorily taken, and lands acquired voluntarily for extraordinary purposes; and that the very object of the permission given to railway companies to purchase and hold lands, and to sell and re-purchase from time to time,—forbid the conclusion that such lands behoved to be sold within the prescribed period. A specialty was said to exist in the fact that some portion of the land was within the deviation line, and might have been taken compulsorily at any time before the expiration of the three years after the passing of the Act. The answer is that, even assuming the fact to be so, the land was not so taken. It was only after the expiry of the three years that it was, along with other ground beyond the deviation line, made the subject of

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purchase by voluntary agreement under the company's powers to acquire the whole land for extraordinary purposes. On these ground I think the interlocutor under review should be recalled, and decree pronounced in favour of the *Caledonian Railway Company* to the effect concluded for in the summons.

Against this judgment the present appeal was presented, Sir *Roundell Palmer*, Q.C., and Mr. *Lloyd*, Q.C., appearing for the *City of Glasgow Union Railway Company*. *The Lord Advocate* (1), Mr. *Cotton*, Q.C., and Mr. *Burns Shand*, were counsel for the Respondents.

The following opinions were delivered by the Law Peers :—

THE LORD CHANCELLOR (2) :—

My Lords, the 120th section of the *Lands Clauses Consolidation (Scotland) Act* requires that within the prescribed period after the expiration of the time limited for the completion of the works the promoters shall sell and dispose of all superfluous lands in such manner as they may deem most advantageous, and in default thereof such superfluous lands remaining undisposed of shall thereupon become the property of the adjoining owners. The Appellants here say, they are not unwilling to pay the price for the land, provided they can acquire a good title thereto ; but that the operation of this 120th section will be to pass the title to the owner of the lands adjoining. Now, my Lords, this section, which is similar to the corresponding English one, has received its construction on several occasions in our Courts (3). But the question as to "superfluous lands" under this section does not arise here. The present case turns upon the point as to what is called "extraordinary purposes;" a point which was discussed fully before the learned Judges in the Court below (4); and I entirely concur with them. The statutory provisions really applicable to this case I will now state.

By section 12 of the *Lands Clauses Consolidation (Scotland) Act*, it is enacted that

In case the promoters of the undertaking shall be empowered by the special Act to purchase lands for extraordinary purposes, it shall be lawful for all parties,

(1) Mr. *Young*, Q.C.
(2) Lord *Hatherley*.
(3) See *Moody* v. *Corbett*, Law Rep. 1 Q. B. 510.
(4) Session Cases, 3rd Series, vol. vii. p. 1072, where the case is fully reported.

under the provisions herein contained, to sell, feu, and convey the lands so authorized to be purchased for extraordinary purposes.

And this, my Lords, is followed by the provisions of the 13th section of the same Act, to the effect that

It shall be lawful for the promoters of the undertaking to sell the lands which they shall have so acquired for extraordinary purposes, or any part thereof, in such manner as they may think fit; and again, to purchase other lands for the like purposes, and afterwards sell the same; *and so from time to time.*

There is nothing said as to any necessity for selling the land so purchased within a given time; on the contrary, those lands may be sold and disposed of from time to time, and other lands may be bought. There is nothing said about their vesting in the adjoining proprietors, nor is there any provision that there shall be a right of pre-emption given to the owners of the adjoining lands. As to lands required for extraordinary purposes, a power is given to all persons holding a limited interest to part with their interest when the property is wanted for such extraordinary purposes. But it is done by a voluntary agreement, and nothing can be forcibly taken from the proprietors for that purpose. Those "extraordinary purposes" are defined to be for "providing additional stations, yards, wharfs, and places for the accommodation of passengers, and for receiving, depositing, and loading or unloading goods," and so on. Of course we all know that a variety of circumstances may from time to time arise, which may render such additional accommodation necessary.

The only argument against this construction is derived from a clause declaring that when the time has expired for the completion of the works, the powers of the Act shall cease as to all works which are not completed. Then, in the definition of works, it is said that works shall include railway stations, and so on. But I think that clause is subject to a reasonable construction, with reference to the sense and context of the Act. Now it would be unreasonable to say that when powers are given for acquiring land for these extra works, those powers are to cease, not only with regard to portions of railway which have never been constructed, and for which, of course, no accommodation would be wanted, but also as regarded a railway which is already constructed, and which would require further accommodation.

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I apprehend if there be one thing clearer than another it is the decision of your Lordships in the case of *Brown* v. *The Stockton and Darlington Railway Company* (1), that the engineers of a railway line, acting *bonâ fide*, are to be taken as conclusive judges of what is and what is not necessary for the purposes of the company; and in this case the accommodation being wanted for a large city, and it not being possible to foresee at the moment the whole extent of the accommodation which might be required, I apprehend that the legislation has been wise in allowing the company to acquire from time to time not more than fifty acres at once, and that they may from time to time sell that which they do not want in one place in order that they may purchase that which they do want in another place.

I have already observed that the question as to "superfluous lands" does not arise in this case. It was argued that the very fact of the sale shews these lands to have been superfluous; but by the Act of Parliament it was intended to give a large scope for the public accommodation, allowing the company to purchase what was wanted from time to time, and to sell from time to time. The time had expired by which, if the property had been acquired under the 120th clause, it would have been forfeited; but I cannot agree that this land is subject to the operation of that clause.

It has been pressed upon us very much that the 120th clause applies to all lands within the limits of deviation which could have been taken by the railway company compulsorily. I think there is a great fallacy in that argument. If the lands were taken compulsorily the Act would apply; but they were taken by a voluntary agreement for extraordinary purposes, for enlarging the stations, and so forth.

Upon those grounds, my Lords, I trust your Lordships will hold that the Court of Session has come to a right conclusion, and that this appeal should be dismissed with costs.

LORD WESTBURY:—

Two sets of powers are given to a railway company, one by which they may compel unwilling proprietors and enable incompetent

(1) 9 H. L. C. 246.

proprietors to part with their lands; and another by which they are left to acquire lands by private treaty and agreement.

We naturally expect that lands taken by compulsory powers shall, if not wanted for the railway, be restored to the proprietors from whom they have been compulsorily taken. But the company is left to deal with the lands which they have acquired by private treaty, as any ordinary proprietor may do. By the 12th and 13th clauses of the *Lands Clauses Consolidation (Scotland) Act* they are left at liberty to sell those lands from time to time, and to acquire other lands. The contention, therefore, that those lands became by disuse and lapse of time superfluous, within the meaning of the 120th section, is a mere mistake. The lands that come within the 120th section are not lands acquired by private agreement. The contrast between the 13th section and the 120th section proves that beyond the possibility of doubt.

There is only one point on which I felt some difficulty; whether a small portion of the land in question, being within the limits of deviation, could be regarded as acquired by private treaty. That difficulty, however, is removed when you consider that *de facto* the lands were not bought by the company by private treaty until after their compulsory powers had expired; and I have no difficulty in holding that the power of buying land by private contract will include lands lying within the limits of deviation after the compulsory powers of taking those lands have come to a termination.

It will be a satisfaction to the Appellant company to feel that by the decision of your Lordships' House they get a good title, and in return for that benefit they must pay the costs of this appeal.

LORD COLONSAY:—

My Lords, I am entirely of the same opinion.

Interlocutor affirmed, and appeal dismissed with costs.

Solicitors for the Appellant: *Martin & Leslie.*
Solicitors for the Respondent: *Grahames & Wardlaw.*

1871 THE DUKE OF HAMILTON . . . . . APPELLANT;
July 28. GRAHAM OF CAMBUSLANG . . . . . RESPONDENT.

Charter reserving Minerals—Right to make underground Passages.

Where in a feu charter the superior reserves the coal and limestone with the right to work them, giving satisfaction for damage, the right reserved is a right of property, or absolute ownership, and not a mere servitude or easement; the surface and the minerals becoming separate tenements severed in title.

Held (by THE LORD CHANCELLOR (1), LORD WESTBURY, and LORD COLONSAY (reversing the decree below)), that in such a case the superior, as absolute proprietor of the reserved coal and limestone, may make a tunnel through them for the conveyance of other minerals belonging to him in the lands adjacent.

Per LORD COLONSAY:—It is a great mistake to say that the proprietor has no right to use those minerals except for the purpose of bringing them to the surface. He may use them in the way most beneficial to himself. To say that he is carrying the minerals through another man's property is a mistake. He is carrying them through his own.

LORD CHELMSFORD, *contrà*:—The result of my consideration is, that although minerals excepted out of a grant may be regarded as an estate or tenement separate from the surface land, yet the property in them is of a peculiar and limited character; and very difficult questions will arise if the doctrine of absolute ownership is adopted.

THE question in the present case was, whether the Duke of *Hamilton*—who had a right to coal and limestone under a portion of the *Cambuslang* estate—was entitled to make and use a passage through such coal and limestone for the conveyance of other coal and limestone to which his Grace had a similar right under lands adjoining.

The action was brought by Mr. *Graham* to obtain a judicial declaration that the Duke was not entitled to have coal, limestone, or other minerals from extraneous lands carried over or under the *Cambuslang* estate. The summons sought an interdict, and claimed damages to the amount of £10,000.

It was not disputed that the Duke was entitled to the coal and limestone under a certain part of *Cambuslang*, described in the title deeds as "£3 12*s.* *and* 12*s.* *lands of old extent*;" and the question was confined to that portion of the property.

(1) Lord *Hatherley*.

The Duke of *Hamilton* has the *dominium directum* of the *Cambuslang* estate, as its feudal superior, from whose family Mr. *Graham* derived the *dominium utile* thereof; the coal and limestone in the "£3 12*s.* land of old extent," forming the subject of the following clause in the feu charter:—

Reserving always to the said Duke of *Hamilton*, and his heirs and successors, all and sundry the coal and limestone within the bounds of the lands before specified, so as it shall be lawful to the said Duke and his foresaids to sett down coalpits, shanks, and sinks, and win coal and limestone, within the bounds of the said lands, or any part thereof; and to make all engines and easements necessary for carrying on the said coal and limestone work, and free ish and entry thereto for making sale thereof and away taking the same; the said Duke and his foresaids always giving satisfaction for any skaith or damage through downsetting the coal-pits, sinks, or shanks, or by winning the said coal or limestone, or by the roads and passages for away taking the same.

As to "the 12*s.* land of old extent," the clause was in these terms:—

With and under the reservation to the said Duke and his foresaids of the coal and limestone that shall be found within the haill bounds of the 12*s.* land above specified; so that the said Duke and his foresaids shall have liberty to set down coal-pits, sinks, and shanks, and win coal and limestone, within any part of the said lands, and may have liberty to make all engines and easements necessary; with free ish and entry for the making, keeping, sale, and away taking thereof; the said Duke and his foresaids always giving satisfaction to the vassal for any loss, skaith, or damage therethrough, or by the roads or passages for away carrying of the same.

The Lord Ordinary (1), holding that the Duke under these reservations was "absolute proprietor of the minerals," gave judgment against Mr. *Graham*, with expenses; but upon a reclaiming note his decision was recalled, five Judges disagreeing with the Lord Ordinary, and three concurring with him (2).

The Duke of *Hamilton* appealed to the House, having for counsel Sir *Roundell Palmer*, Q.C., and Mr. *Anderson*, Q.C.

The Lord Advocate (3), and Mr. *Pearson*, Q.C., appeared for Mr. *Graham*.

(1) Lord *Barcaple*.

(2) *Per* LORD DEAS:—"Four Judges have taken one view of this case, and five another." Session Cases, 3rd Series, vol. vii. p. 981, and also vol. vi. p. 965.

(3) Mr. *Young*, Q.C.

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The following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR:—

My Lords, in this case there was a great difference of opinion on the part of the learned Judges in the Court below with reference to the true conclusion at which the Court there should arrive, regard being had to the somewhat singular character of the possession of the property of *Cambuslang*, which is divided into two separate properties, as it were, the one being the property in the surface, and the other the property in the mines beneath the surface. Questions of the same character have arisen in this country from time to time, and have been much discussed, but I am happy to find from one of your Lordships now present (Lord *Colonsay*), and from the argument which we had addressed to us at the Bar, that there appears really to be no distinction whatever between the law of *Scotland* and the law of *England* with regard to this question. The reasoning of the learned Judges, both of those who took the one view and of those who took the other in the Court below, entirely pursues the line of argument which has prevailed in this country when questions arising from a similar complication with reference to the holding of property have occurred.

I am relieved in this case from a great deal of difficulty by the opinions of the learned Judges in the Court below, both on the one side and on the other, as to the state of the law in *Scotland*. As regards the law of *England*, I had occasion to consider it on a previous occasion in *Proud* v. *Bates* (1), and I have seen no reason to withdraw from my decision in that case.

By the law of *England* when you demise a property, excepting a certain part of it, there is no demise of the part excepted. Thus minerals excepted remain in the lessor. The lessee takes no interest or right whatever in them.

If, on the other hand, you reserve certain rights and interests, parting with the property, the rights and interests reserved must enure by way of re-grant from the person to whom you make the disposition. I so held in *Proud* v. *Bates*.

(1) 34 L. J. (N.S.) Ch. 406. See *Lewis* v. *Branthwaite*, 2 B. & Ad. 437; *Keyse* v. *Powell*, 2 Ell. & Bl. 132; *Bowser* v. *McLean*, 2 De G. F. & J. 420, containing the remarks of Lord Chief Justice *Campbell*.

In *Scotland* there may be a direct feudal title to certain portions of land, and there may be a direct feudal title also to certain strata of land interposed between the centre of the earth and the surface, which may belong to another proprietor by a distinct feudal title, and those titles may be dealt with and disposed of as if they were two separate tenements in every respect, shewing very clearly the distinction between a reservation of the land itself, and a reservation of a right or privilege. If you reserve only a servitude, or, as we should call it, an easement, all the Judges agree that the Law of *Scotland* (like our English law) is, that you cannot use a servitude for any other purpose than the particular purpose for which it was originally created, just as you cannot use an easement for any other purpose than that for which it was originally granted. Take, for instance, the case of two adjoining parks belonging to *A.* and *B.* *A.* has no access to his mansion-house except by a road through his neighbour *B.'s* park, over which he has acquired by grant a right of way for the purpose of enabling him, and all other persons coming to his house, to enjoy the privilege of driving along it, and so reaching a road in his own park and proceeding to the house. It is quite clear that he could not use the portion of road over which he has only a right of way for any other purpose than that of obtaining access to his own house. As regards his own park, of course it is quite clear that he might use the road there for any purpose he thought fit.

Then, suppose *A.* sells to *B.* his own park, reserving only his lawn and shrubberies, and still residing in the residence to which he requires an access, it is quite clear that then he would not be able to use that which had been originally his own in any way he pleased, but he could only use it as a means of access for himself and his friends to his house, of which he still retains possession.

But suppose that in order to have complete dominion over the road up to his house, instead of reserving a right of way over what he is selling, he reserved the road, and says, "I convey my park to you, excepting and reserving that road which runs from one point to another," being the whole road through his own park, I apprehend that he might do whatever he pleased with that road; he might fence it off and prevent *B.* from having any access to it, leaving *B.* to make a new road for himself. *A.* would have the

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sole control and dominion over the property in the road, that property being his just as much after he had executed the conveyance as before.

The Respondent is bound to shew that a trespass has been committed upon his property by the acts complained of on the part of the Duke. It appears to me, my Lords, that there is plainly a want of evidence of anything of the kind.

I apprehend that if the Duke had no way of conveying his minerals through this space but by drawing them over part of the granted property great difficulties would present themselves. If he had that difficulty to encounter a question of trespass might well arise; but I do not think, on the case as averred, still less on the case as proved, that it has been shewn to us that the Duke is in any way trespassing on what may be called this gentleman's property, that is to say that which was granted to him. There being no evidence to that effect, the Pursuer is not entitled, as it seems to me, to the declarator which he asks for, inasmuch as no wrong has been done to him, and no injury, as I think, is even sufficiently averred, still less proved, and, of course, therefore he is not entitled either to the interdict or to the damages that he asks for.

I think, therefore, the proper course in the present case is to declare that the Duke is entitled to an absolvitor with expenses.

LORD CHELMSFORD:—

My Lords, considering the difference of opinion which prevailed amongst the learned Judges in *Scotland* upon this case, it is impossible not to feel that it is one of difficulty as well as of importance, and that no conclusion can be arrived at without some hesitation and doubt of its correctness. Under this impression I have carefully and anxiously considered the case in all its bearings; and in the result I have the misfortune to differ from the conclusion at which all my noble and learned friends have arrived.

The action is one of declarator and interdict, in which the Pursuer (the Respondent) claims to have it found and declared that the Defender (the Appellant) had no right, either by himself or others, to make or use any roads or passages, whether above or below ground, through the Pursuer's lands of *Cambuslang* for the

purpose of carrying or conveying coal, limestone, or other minerals raised from lands other than the said lands of *Cambuslang*. And that the Defender should be interdicted from using any roads or passages for such purpose.

The coal and limestone under the lands of *Cambuslang* and *Clydesmill* form one continuous mineral field, from which the minerals have not been exhausted. The Duke of *Hamilton*, in 1852, let the coal in *Clydesmill* and a portion of the coal under the Respondent's lands of *Cambuslang*, and the lessees have been working the coal under both of these lands, bringing the coal got from *Clydesmill* under the lands of *Cambuslang*, and thence by other coal fields to a distant pit from which the coal is brought to the surface.

The Respondent questions the right of the Duke, or his lessees, to use the way or passage under his lands of *Cambuslang* for any other purpose than that of the "away taking" of the coal and limestone got within the bounds of these lands. And he relies upon the words of the reservation in the charter of 1657 as shewing that the coal and limestone were not reserved absolutely to be used in any way the grantor might think proper, but "so that" he might win them and have free ish and entry for the away taking and away carrying thereof.

The Duke, on the other hand, insists that the coal and limestone, under the reservation in the original feu charter, remained the property of the superior as an estate separate and distinct from the lands granted to the Respondent's predecessor, and that he, as absolute owner, has a right to use, and to authorize others to use, the strata of coal and limestone as a way or passage generally, provided no injury is thereby done to the Respondent's lands.

The nature and extent of the interest which remains in a grantor upon an exception of mines or minerals in a grant of the surface appear to me not to have been precisely defined in the few cases which are to be found upon the subject; but they all seem to me to assume that by the exception of mines and minerals in a grant the land remains in the grantor, not to be used in its natural state at the pleasure of the owner, but as a species of property which can be made profitable only by removal, and which therefore

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carries with it as necessarily incident a right to use all proper means for obtaining the minerals, but nothing further.

The passage cited from *Erskine* (2, 6, 5) which states that a coal mine is sometimes made a separate tenement from the land, gives no information as to the nature of such tenement, nor of the rights which are incident to it; and in *Forbes* v. *Livingstone*, cited by Mr. *Anderson* from the Faculty Collection, where it was found that, by virtue of a reservation of coal and limestone in the original feu charter, those minerals continued a part of the estate belonging to the grantors, there is no explanation of the nature of such reserved estate, it being wholly unnecessary to be considered with a view to the decision.

I cannot find any case which has decided that the exception of minerals in a grant of the surface land carries with it a right to use them for any other purpose than that of removal. The case of *The Durham and Sunderland Railway Company* v. *Walker* (1) appears to me to have no bearing upon the question. That was not the case of an exception or reservation (although so called in the deed), but of a power granted to the Dean and Chapter under a lease granted by them to the Defendant, with an exception of the mines, quarries, and seams of clay under the lands, with full and free authority and power to dig, win, work, and carry away the mines, quarries, and seams of clay, and with free ingress, &c., way-leave, and passage to and from the same, or to and from any other mines, &c., and with power of laying, making, and granting waggon-ways in and over the premises, or any part thereof. Chief Justice *Tindal*, in delivering the judgment of the Court of Exchequer Chamber, said, "A right of way reserved (using that word in a somewhat popular sense) to a lessor, as in the present case, is, in strictness of law, an easement newly created by way of grant from the grantor or lessor;" and the Court decided that the right given to the Dean and Chapter was only that of making and using ways, and granting way-leaves for the purpose of getting the excepted minerals, not for carrying coals and minerals from other mines, though belonging to themselves. It is clear that this case decided nothing as to the rights incident to excepted mines. The lessors would have had no right to make

(1) 2 Q. B. 940.

waggon-ways upon and over the surface, unless there had been an express stipulation in the lease for the purpose, and the restriction of this right to the purposes of the mines under the lands leased depended entirely on the words of the (so-called) reservation.

So the case of *The Earl of Cardigan* v. *Armitage* (1) was not a question as to the rights possessed by a grantor under an exception of coal mines out of a grant, but whether a purchaser of the mines from the heirs of the grantor was entitled to sink and dig pits, the exception limiting the right to the time during which the grantor and his heirs should continue owners of the demesne lands. The Court held that the exception retained the coals to the grantor and his heirs, with power, incident and implied, to take them away when they would, and that this power could not be restrained by a special power given in the affirmative. Mr. Justice *Bayley*, in giving judgment, said, "The coals were part of the thing granted, part of the land, and *in esse* at the time. The consequence, therefore, according to *Co. Litt.*, is, that if this which in words was an exception, operated in point of law as an exception, the coals *semper cum* Sir *T. D. fuereunt.*" "And according to the rule mentioned from *Sheppard's* Touchstone, a right as incident to get the coals, and to do all things necessary for the obtaining them, would have been excepted also." If, as insisted upon by the Appellant, the exception gave the grantor an unqualified right to use the coal mines for all purposes at his will and pleasure, as his absolute property, one is naturally led to ask what necessity there was for Mr. Justice *Bayley* to specify the rights which were excepted with the exception, and why he restricted them to what was necessary for getting the coals?

The case of *Dand* v. *Kingscote* (2), cited by the Counsel for the Respondents, was also a case in which it was not necessary to consider what incidents belong to an exception of mines and minerals; but, like the case of *The Durham and Sunderland Railway Company* v. *Walker* (3), was a question whether an easement annexed to an exception of coal mines could be used for the carrying away coals got under other lands than those to which the exception applied.

(1) 2 B. & C. 197. (2) 6 M. & W. 174.
(3) 2 Q. B. 940.

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The case of *Proud* v. *Bates* (1), before my noble and learned friend the Lord Chancellor when Vice-Chancellor, was strongly relied upon by the learned counsel for the Appellant as establishing his right to use the coal and limestone remaining under the Respondent's lands as a means of conveyance of minerals got from under other lands. But as I read the case it does not establish any such right. In that case the lease contained a reservation of mines and quarries, with full power and free liberty to sink for, win, and work the same, with all liberties, privileges, and conveniences necessary and convenient for the winning, working and management thereof, with free way-leave and passage to, from, and along the same on foot and horseback, and with all manner of carriages, excepted and reserved to the lessor, his heirs and assigns. The Vice-Chancellor held that the lessor and those claiming under him were entitled not merely to a right of way for the purpose of working the reserved minerals, but to an absolute way-leave which might rightfully be used for the purpose of working minerals not under the demised property. The reasons given for the judgment shew that it proceeded upon special grounds, and that it decided nothing as to the rights which belong to the owners of excepted mines. The Vice-Chancellor said that "the reservation of the mines and quarries must be considered not to be a reservation of the whole ownership, but a grant, as it were, to be taken out of the property demised." And, adverting to the case of the *Earl of Cardigan* v. *Armitage* (2), where it was held that when once you reserve mines you reserve everything that is necessary for working them, including the way-leave for carrying away the minerals, he observed "that this was a ground for supposing that when the reservation was expressed as it was expressed in the case before him it was not intended to be restricted to the *limited* right;" and, he added, that as the lessor was entitled to the property in the whole manor within which the mines were situate, looking to the probable intent and purpose of the parties his view was strengthened that "what was expressed to be absolute, was meant to be absolute, and that the lessor had reserved to himself the full, complete and absolute right of going through this property with carriages and horses for any purpose whatever, and for any unlimited right he might think fit."

(1) 34 L. J. (N.S.) Ch. 406. (2) 2 B. & C. 197.

This examination of the case shews it to be no authority for saying that when minerals are excepted out of a grant or lease they may be used for any other purpose than that of carrying them away, nor does that seem from his language to have been at that time the opinion of my noble and learned friend, although from what he has told your Lordships I have probably misconstrued his meaning.

THE LORD CHANCELLOR:—As to the excepted mines I held that the owner had an absolute right to do what he pleased with them, and that he, therefore, had a right to carry his coals through them. But this curious thing happened in that case. In order that a horse might have his head moved whilst backing the vehicles they had to chip off part of the mine which had not been excepted but as to which the right had been reserved. And in that part of my judgment where I am dealing with the right reserved as distinguished from the mines excepted, I distinctly say that the form of reservation appears to be general.

LORD CHELMSFORD:—I am obliged to my noble and learned friend, of course, for correcting any inaccuracy into which I may have fallen; but I was taking the language of my noble and learned friend, and, as far as my own view of it was worth anything, it seemed to me to justify the observations I have been making to your Lordships, because my noble and learned friend speaks of the reservation of the mines and quarries as not being "a reservation of the whole ownership," and of the exception of the mines giving the lessor "the restricted right of working them." And, as far as I can understand, my noble and learned friend decided the case upon its special circumstances, and particularly on the ground that if the way-leave were restricted to the limited right of carrying away the excepted minerals, the reservation would give the lessor nothing which he could not have had without it, and therefore as it was capable of a more enlarged and general meaning it must be construed according to the probable intention of the parties, as reserving an absolute right of using the way-leave for any purpose whatever.

The result of my consideration of the cases has been to lead me

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to the conclusion that although where mines or minerals are excepted out of a grant or lease they may be regarded as an estate or tenement separate from the surface land, yet the property in them is of a peculiar and limited character; it is rather a right to take away a part of the land for the profitable enjoyment of it than to possess it in its undisturbed natural state. If under an exception of mines or minerals a grantor or lessor has the same property in them as any other absolute owner has in the land belonging to him, the Appellant would have a right to grant way-leaves over the coal and limestone excepted to any person or any number of persons to carry minerals from other mines, which he might find to be a more profitable application of his property than gradually to exhaust it by working out the minerals.

Very nice and difficult questions will arise if the Appellant's view—that the exception of this peculiar description of property gives a right to use it in any way in which land may be used at the will of an absolute owner—is adopted. For instance, if the coal and limestone are worked out for a certain space, whether the right to carry minerals from other mines does not cease, as it cannot be exercised without passing over what may be said to have become the Respondent's property by the exhaustion of the superincumbent portion of the land belonging to the Appellant; or whether (as suggested by Sir *Roundell Palmer*), if all the coal and limestone is exhausted, the Appellant will not have a right to continue to use the subjacent stratum as he had previously done. But as I do not agree in the view which the Appellant takes of his right, it is unnecessary for me to consider these questions.

I cannot, however, forbear noticing the argument of Lord *Ardmillan* against the Appellant having only a right restricted to the removing of the coal and limestone under the Respondent's land. He supposes the Duke of *Hamilton* to grant some ten or twenty feu rights of half an acre each, reserving in each conveyance his property in the coal, the whole coal being one continuous field; and he asks whether it can be "reasonably contended, as the meaning or effect of such a transaction, that the Duke was not entitled to such continuous working, but was bound to take out the coal under each half acre through the surface of that half acre, and bound to

stop his continuous working on the demand of any one of the feuars." If the incidents which accompany the exception of mines are only those which are necessary for working and carrying away the minerals, it is, of course, immaterial whether the lands under which they lie are of large or small extent; and if the Duke were disposed to let out his lands under which there was a continuous coal-field in small parcels, there would be no difficulty in inserting in each lease a reservation of a right of passage from every part of the mine over the part excepted, and thus preventing the inconvenience suggested.

If the exception of the coal and limestone in the original feu grant to the Respondent's predecessor carried with it the right to the minerals which remained in the grantor, for the purpose merely of winning and getting them, but not further, or for any other use and purpose (which is the opinion I entertain), the Respondent, upon the assertion of a right more extensive than that which belongs to the Appellant, is entitled to the negative declarator that the right does not exist, and also to an interdict from his exercise of it.

I have bestowed much anxious consideration upon this case, in which, although my opinion is supported by that of many learned Judges in *Scotland*, it is opposed by an almost equal number, and also by all my noble and learned friends. It is, I hope, unnecessary for me to say that, in these circumstances, I feel very far from confident when I express my opinion that the interlocutor appealed from ought to be affirmed.

LORD WESTBURY:—

I regard this case as depending on the true legal construction and effect of the reservation contained in the grant of the *dominium utile* to the Pursuer's author. I think that that question must be settled entirely by the principles of real property law which have been established in *Scotland;* and I think it will be found that those principles are amply sufficient for the purpose.

The Duke of *Hamilton*, the grantor, at the time of the grant in question, was the owner *in pleno dominio* of three particular estates, parts of the same barony—the estate of *Clydesmill*, the estate of *Cambuslang*, and the estate of *Morristown;* the estate of *Cam-*

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buslang being interjected between the other two. Beneath all three there was one large coal-field capable of being worked continuously, and in fact worked at that very time continuously. The field lying beneath the one estate, and the mode of winning the minerals there, was made, to a certain extent, subservient to the mode of working and winning the minerals under the other estates. The Duke of *Hamilton* made a grant to the author of the Pursuer; and that grant amounted to nothing more than a grant of the *dominium utile* in a part of the lands of *Cambuslang*. The effect of the reservation in that grant was to shew that the Duke intended to retain the *plenum dominium* over the mines. One of the things leading to a right apprehension of this question is the true perception of the fact that what the Duke had by virtue of that reservation was not any new emerging right, but that the reservation amounted to nothing more than a manifestation of the intention of the parties that the Duke should remain *in pleno dominio* of the mines underneath those lands of which he had granted the *dominium utile* to the Pursuer's author.

That being the state of the case, the Duke was desirous of adding to the right which he had, as feudal proprietor of the mines, certain additional powers; and these additional powers formed the second part of the reservation. They were powers rendered necessary, or, at all events, very expedient, by virtue of the grant which he had made of the *dominium utile* in the surface of the lands to the Pursuer's author. They were powers to break through the surface of the lands for the purpose of the more convenient winning of the coal lying beneath the lands, and of which the ownership remained intact and undiminished in the Duke.

The extraordinary character of the present contention of the Pursuer is that those things which were superadded to the rights incident to the feudal *dominium* are now made use of for the purpose of limiting, restricting, and contracting the ownership and right of enjoyment incident to that feudal *dominium*. Can anything be more absurd? You cannot possibly say that the whole *plenum dominium* reserved in the mines, and belonging to the Duke, was qualified and restricted by virtue of a thing which was reserved out of the grant for the very purpose of rendering more complete, in point of facile enjoyment, that ownership which never entered

into the grant, and which is not to be converted into a mere right of entering within the lands to win the minerals, but remains an absolute estate, to which all the privileges and all the incidents of the ownership of an estate belong. That is put beyond the possibility of doubt by the cases which have been cited, and the instances which are collected in Lord *Deas'* opinion and also in Lord *Ardmillan's*.

The undiminished, undeteriorated, absolute estate in the mines is not, and never was intended to be, affected by the grant to the Pursuer's author; and therefore the subject of the estate may be enjoyed in every way in which it was competent or fit to enjoy it antecedently to the grant of the *dominium utile*. You may approach it laterally, from another estate, for the purpose of winning the minerals. You may use the strata which you have reserved to yourself, or rather declare to remain in yourself (for the word "reservation" introduces some obscurity and confusion of thought into the matter), in any manner consistent with ownership. You may traverse it from any adjoining land you have. You may create a road or a tunnel through it. And you may through that road or tunnel carry either the minerals or any other proceeds of an adjoining estate. You, therefore, have, for there is nothing to restrain you, the same universal right and unlimited power of enjoyment of the estate that remains in you, as you had antecedently to the grant of the *dominium utile*, the enjoyment of which that grant of the *dominium utile* in no respect impairs or affects.

I hold, my Lords, that anything remaining *in pleno dominio* of the superior is capable of being won, enjoyed, and dealt with precisely as if there had been no grant to the author of the Pursuer.

The same thing would take place in *England*, but I am very reluctant upon a matter of this kind to have recourse to English authorities or English rules at all. Suppose, now, that in one of the chalk counties I granted an estate to a person, retaining to myself the strata of chalk lying beneath the surface—we all perfectly well know that many a stratum of chalk lying beneath the surface is fifty, sixty, or eighty feet deep—is it meant to be said that I have not a right to run a tunnel through that stratum of my own property which is thus reserved to me, and to use that

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tunnel for any collateral purpose of the estate adjoining that stratum so reserved?

Upon these grounds, which are very well illustrated by Lord *Deas* and Lord *Ardmillan* (1), I entirely concur with my noble and learned friend on the woolsack that this interlocutor should be reversed, and that a decree of absolvitor in favour of the Defender should be substituted for it.

LORD COLONSAY:—

I think that in the Court below a great deal of difficulty has been introduced into this case by not clearly keeping in view the distinction between a right of property and a right of servitude. The case is, in some respects, a novel one, and I am not surprised that there may have been a difference of opinion in regard to what might be the rights of the parties with respect to certain views of contingent interests such as those arising in the event of the exhaustion of the minerals. And I am not surprised that there has been some difference of opinion with regard to what was the meaning of this reservation. But it is quite obvious to all feudalists, that the right of the Duke of *Hamilton* rests not upon the deed which he granted to Mr. *Graham*, but upon his right to the barony and lands under his original infeftment; the deed to Mr. *Graham* only shews that that part of the Duke's original estate which has been spoken of as having been reserved, has not been given away.

It is a great mistake to say that the Duke has no right to use those minerals except for the purpose of bringing them to the surface. He may use them in the way which is most beneficial to himself. For instance, he may have reserved the stratum merely in order to prevent his adjoining minerals from being flooded by water. That would be a beneficial enjoyment of it without bringing it to the surface. He may be the possessor of minerals lying upon a certain inclination east and west of these, and the water may be accumulating upon his minerals to the west, and he may use the stratum of minerals he has reserved for the purpose of enabling him to conduct the water through those minerals down to the lower level on the east, and so get rid of it. There are

(1) Third Series, vol. vii. pp. 981—987.

various ways in which he may turn the minerals to account without bringing them to the surface; and I cannot understand that so long as those minerals, that is to say, the estate which remains to him and is not given away, continues to exist, he cannot use it in any way that is beneficial to himself unless he uses it to the injury of his neighbour.

Now, my Lords, that being the position of the parties here, I think that there is a radical mistake in the grounds upon which the reasoning and the opinions of some of my learned friends, the Judges in the Court below, have proceeded, and particularly in the leading opinion in the case, in which it is said, "It is not alleged that pits opened on the surface of *Cambuslang* estate could be used for the winning of coals wrought in adjoining coal-fields. Any attempt to do so would be at once interdicted as contrary to the clear rights of the Pursuer under his feudal title and having no support from anything contained in the clause of reservation." That I entirely agree with. The opinion proceeds, "On the same principle I hold it to be equally objectionable to bring the coals of an adjoining estate into *Cambuslang*, and carry them underground through that property into an adjoining coal-field. This could not be done on the surface of the lands, and it can as little be done in the excavated waste, forming a tunnel underground." That is placing the rights of the Duke of *Hamilton* in the minerals upon no higher footing than the right he has upon the surface. It is placing a right of property in the same position as a right of servitude. There is no doubt that the Duke of *Hamilton* was not entitled to increase the burden upon the servitude on the surface by bringing the minerals from his other property over the surface. The surface was the servient tenement, and the minerals under that tenement were the dominant tenement in regard to that particular right of servitude. But that principle does not apply in regard to the right of property. And to say that he is carrying the minerals through the property of the Pursuer is another mistake. He is carrying them through his own property, and not through the property of the Pursuer at all. There is a want of keeping in view the distinction between the rights of property and the rights of servitude here which seems to me to have led to an erroneous judgment in the case. I conceive that so long as there

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exists any of the mineral property which the Duke of *Hamilton* has, he is entitled to use any of that property in the mode which is most beneficial to himself.

It does not appear from the record that the mineral property has been exhausted; on the contrary, there is a great deal of it there still. But more than that, it does not appear to have been exhausted even on those parts of the property over which the minerals from the adjoining property are drawn. It is said it is in the waste—in the places where you have worked out the minerals, that you draw the minerals from the adjoining property. But it appears that there are a great many pillars left yet, and those pillars may be worked out when they are no longer required to sustain the surface—there is a right to work them. It does not appear that the whole pavement of coal is worked out, or that the limestone is worked out—there is no averment to that effect on the record; nor in the evidence is there any trace of proof that while the Appellant is carrying the minerals along under the *Cambuslang* estate he is touching anything that is not part of that which he retained for himself. He is within the ambit for aught we see of that property which has been his all along as being part of his original enfeofment, which he has not granted away to the Respondent.

Upon these grounds, my Lords, I am of opinion that the demand of the Respondent cannot be sustained, and that we must alter the interlocutor and assoilzie the Duke.

Interlocutor of the First Division reversed and the Duke of Hamilton assoilzied.

Solicitors for the Appellant: *Gregory, Rowcliffe, Rowcliffe, & Rawle.*

Solicitors for the Respondent: *Loch & Maclaurin.*

JAMES ADAMSON BEVERIDGE . . . . APPELLANT; 1872
ROBERT BEVERIDGE *et al.* . . . . . RESPONDENTS. *Feb.* 19.
et è contra.

Signature of a Partnership Firm or Name by the Manager.

The manager of a company is not entitled, as such, to sign the firm or name of the partnership:—

Held by the House (agreeing with the Court below), that the authority of trustees representing three fourths of the property of the concern—was insufficient to empower a manager, as such, to sign the company's firm, especially when the proceeding was opposed by the representative of the remaining fourth.

Comments by the Law Peers on the Administration of a Company's Manager.

Censure of the manager's conduct in leaving signed cheques, blank as to the amount, in the hands of clerks to be used by them at discretion.

Censure of the manager's conduct in depositing the company's cash, to a large amount, in certain banks without the consent of all the partners.

Declaration by the House (disagreeing with the Court below) that a manager had exceeded his legitimate powers in increasing the wages of the company's servants, and also in substituting, for the original, more expensive machinery without the consent of the partners.

Question left undecided.

Whether an individual partner can institute a suit or bring an action in the name of the partnership, the House deemed it unnecessary to decide.

PRIOR to 1864, the late Mr. *Erskine Beveridge* carried on a large and lucrative business as a linen manufacturer at *Dunfermline*, in *Fifeshire*, his brother *Robert* acting as manager of the concern with a salary of £1200.

By deed of copartnership Mr. *Erskine Beveridge* assumed his eldest son *James Adamson Beveridge* as a partner in the business, allowing him one-eighth of the profits, the deed declaring that the contract should continue notwithstanding the father's death, and that after that event the management of the concern should rest with the uncle *Robert;* "but without infringing on the copartnery rights of the son." This instrument, though executed so far back as the 24th of October, 1864, was not to come into operation until March, 1870. The father, however, died in

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December, 1864, having made his will, whereby he settled his reserved shares upon trust for the benefit of his family, giving his son *James Adamson* a fourth instead of an eighth of the profits, the uncle *Robert* being continued in his office of manager as before, and being also named as one of the trustees, of whom there were five.

The trustees issued an instrument purporting to authorize the manager to sign cheques *in the name of the partnership firm;* the document professing to give him power to "subscribe, *by the said firm name,* all writings which might be necessary for its business."

The Appellant, Mr. *James Adamson Beveridge,* was no party to this document, but, on the contrary, opposing it, commenced on the 17th of September, 1868, the present action, *in the name of the company,* as well as in his own, to have it declared that the manager had no right or power to sign or use the company's firm, or to do sundry other acts in the management, which are fully commented on by the Lord Chancellor in his address to the House. The summons concluded that the manager should be interdicted from entering into any written contracts or agreements not previously approved of by the company and by the Appellant as a partner thereof, insisting, at the same time, that he was bound to accept from the company "a mandate defining his powers and specifying the documents to be signed by him." The Court of Session decided, in the first place, that the manager had no right or legal authority to sign any document *in the name of the firm.* Secondly, they decided that he was clearly wrong in leaving cheques, blank as to the amount, in the hands of clerks to be filled up by them. Thirdly, they decided that he was also wrong in depositing cash belonging to the company (no less than £39,000) in certain banks without the sanction of the partners. But the Court below held at the same time that the manager was, under the circumstances, warranted in varying and enlarging the wages of the company's servants on his own authority, and in altering, at an increased expense, the machinery of the manufactory.

As to the question whether a partner may bring an action not only in his own name, but also in the name of the company, the

Court of Session decided that the Appellant was not entitled to insist in the action in the name of the firm (1).

Mr. *James Adamson Beveridge* appealed in the name of the company, as well as in his own name, against the decision of the Court of Session in so far as it was against him. Mr. *Robert Beveridge* also presenting his cross appeal on the other side.

Sir *Roundell Palmer*, Q.C., and Mr. *Wotherspoon*, addressed the House on behalf of *James Adamson Beveridge*.

Mr. *Pearson*, Q.C., and Mr. *Cotton*, Q.C., were heard for *Robert Beveridge*.

The following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (2):—

This very valuable manufacturing business appears to have been founded by Mr. *Erskine Beveridge*, the father of the present Appellant; and to have been carried on under the firm of *Erskine Beveridge & Co.*

Mr. *Erskine Beveridge* entered into an arrangement for allowing his eldest son, the present Appellant, to become a partner with himself in the business. There was a previously existing partnership between the father and another gentleman which was to subsist until the month of March, 1870, and it was not desired that the son should enter into that partnership, but that the new partnership should commence when that original partnership between the father and the stranger terminated. It so happened, however, that the father died in December, 1864, before the partnership between himself and his son was to commence.

In making the arrangement the father provided that his brother Mr. *Robert Beveridge* (uncle of the Appellant) should be the manager of the concern with very full powers, which were expressed in a deed between the father and the son; but it was stated in that deed that it was to be without any prejudice to the rights of the son under the partnership. That arrangement appears to have been the source of all the difficulties that arose between the

(1) The case is reported very fully in the 3rd Series, vol. vii. p. 1034.
(2) Lord *Hatherley*.

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parties. The father, by his will, made provision for carrying on the business and for the son's having a larger share than, under the original articles of partnership between him and his father, if they had taken effect in his father's lifetime, he would have had, his share being brought up to one fourth of the whole, and the remaining shares being reserved for the benefit of the family of the father, who appointed certain trustees, in whom those shares so retained for the benefit of his family should become vested. They became in effect vested accordingly in a joint body, namely, the trustees under the father's testamentary disposition, that is the persons who were to hold the shares reserved out of his estate, one of whom was Mr. *Robert Beveridge*, who was to carry on the business in the same manner as had been provided originally in the articles between the father and the son.

With these full powers Mr. *Robert Beveridge* would manage in effect for and on behalf of both the parties interested. He would manage it for the parties who represented the father's interest, of whom he was one, being one of the trustees under the father's will; and he would also be the manager of the concern as between the father's share of the business and the son's, but subject to all the son's rights and interests *quâ* partner.

Now, although there is no complaint made with respect to the effect of Mr. *Robert Beveridge's* management, he appears, unfortunately, to have arrogated to himself powers which certainly exceeded the powers vested in him as manager. I need only mention two examples, about which there is no question at all, namely, the fact of his signing blank cheques and leaving them to be afterwards filled up by clerks and others; and the fact of his leaving large sums with different bankers, which, in fact, amounted to investments of the partnership property.

The Court of Session have decided that there was an excess of power with reference to the mode in which this gentleman proceeded as regarded the signing of blank cheques and the loans which had been made to the banks. But there were two other main questions raised before us. The one was with respect to a considerable augmentation of the salary of certain clerks and other persons employed by the partnership, which augmentation was made without the concurrence of the Appellant. The other

main complaint was that the manager had ordered a considerable number of power-looms—instead of hand-looms, to be introduced, at a considerable expense, into the business. He justified this order by saying that the power-looms were wanted for the requirements of the business, and therefore he insisted upon ordering them with or without the concurrence—at all events, without asking for the concurrence—of the Appellant. The Court below appears to have been of opinion that these acts were done in his capacity of manager, and with the authority and power of manager, and that they were justifiable on that ground. But it appears to me, my Lords, that as manager he could not act contrary to the express wishes of the firm or any member of the firm. The question is whether, as manager *simpliciter*, he could have power or authority if it were objected to on the part of any one of the partners to do those acts which would necessarily lead to a very considerable charge upon the partnership property, namely, the increase of the sums allowed to the clerks and the addition to the manufacturing machinery. It appears to be proved that it was for the benefit of the concern that these additional looms should have been introduced; and the measure may have been necessary if existing contracts were to be fulfilled, or if the execution of fresh contracts was to be undertaken for which increased manufacturing power would be required. Then if the introduction of power-looms was to take place, it may very well be that it was necessary that the manager should be the person to effect it; but that necessity could only arise when it came to be the joint will of the whole firm that that scheme should be adopted for carrying into effect the extension of the business with a view to its greater prosperity and efficiency. The business could hardly be enlarged except with the concurrence of the partnership as a whole; it could not be enlarged by the simple act of him whose sole duty it was to conduct and manage on behalf of those by whom he was employed as manager.

That being so, another point of considerable importance to the parties arose as to how this gentleman was to act with reference to the signature of the partnership firm to documents by which the the partnership firm might be charged. There is an express article in the deed of copartnery, that the firm is only to be bound

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when the signature of the firm is adhibited to writings which may be produced in order to charge them. The question arose as to whether the manager was entitled to make use of the signature of the firm in his capacity as manager. The Court below appears to have thought that the difficulty would be sufficiently met by saying that whenever he signed anything as manager, he should not write per procuration of the firm, but that he should sign his name as manager for the firm. But the Appellant contends that for the purpose of defining what documents were and what were not to be signed by the manager, a special mandate should be given to him on behalf of the firm, defining what his duties were with respect to this extremely important and vital point in the management of all partnership concerns, namely, the use of the signature by which the partnership may be charged. Accordingly a form was sent to the manager on the part of the Appellant, to be executed by him as manager, defining the exact extent of the power under which he was to act; and his refusal to execute this document (as of course he was entitled to refuse, if it simply came from the Pursuer alone, and had not the concurrence of the other partners) has also become a matter in dispute, and it is one of the points which have been argued now before your Lordships.

There was another point raised by the Appellant upon which it appears to me that it is unnecessary that any opinion should be expressed upon it, namely, whether or not the Appellant was entitled to use the name of the firm in proceeding with this action, instead of using his own name alone. Mr. *Robert Beveridge* does not simply act as manager, but he and his co-trustees are also, jointly, as a body, partners in the concern, and they have a very considerable interest in the partnership. That being so, I think it is not necessary for us to decide this point, which may possibly hereafter be one of some importance in some case where it is not merely an abstract question, but one upon which the suit itself must depend. I think it is not desirable that we should now express an opinion upon the subject, regard being had to the considerable difficulty, which was suggested by some of your Lordships and by the counsel on the other side, which might arise if it was competent for every member of a partnership who was dissatisfied with any arrangements that were going forward, although his

partners might be satisfied with them, to use the name of the co-partnery; in which case any other member of the co-partnership, a second, or a third, or a fourth member of the partnership, all of them possibly taking different views, might take upon themselves to use the name of the partnership firm, and the result might ultimately be what, to our minds (perhaps because we are more accustomed to the English form of pleadings) would be an exceedingly embarrassing form of record.

With reference to the minute that was been handed in on behalf of the Appellant (1), as the form in which he would ask your Lordships to deal with the decree of the Court of Session, it appears to me that your Lordships may well concur in the view taken with reference to the part that declares distinctly that the right of this gentleman as manager did not extend to the increase of the salaries of the clerks, and the introduction of additional loom-power (which meant in effect additional capital) into the concern without the concurrence of the co-partners; and also that part which requires that Mr. *Robert Beveridge* shall accept such power as may be given to him by the whole body of the co-partners, including not only the Appellant, but the trustees.

LORD CHELMSFORD:—

My Lords, it was natural that Mr. *James Adamson Beveridge*, who has been rendered, I must say, almost a cypher, should have desired to have his position in the partnership judicially determined, and to prevent the exercise of that uncontrolled authority which was assumed by Mr. *Robert Beveridge*.

It is perfectly clear that as manager he had no such power as he has assumed.

It has been urged that he was a partner, and that as a partner he had a right to sign for the firm. Now, there were five trustees appointed. It is said that each of those five trustees was a separate partner. And there being power to add indefinitely to the number of partners, there might have been twenty instead of five; and if Mr. *Robert Beveridge*, by reason of being a partner under those circumstances, was fairly entitled to use the partnership name, then

(1) This minute was read and delivered in by Sir *Roundell Palmer*.

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each of those five or those twenty persons would be entitled to do the same.

But there was no power, either as trustee or as manager, to conduct the business in the way here described, by leaving blank cheques with the clerks; especially when the Appellant was present to sign, if necessary, all cheques which were required for the business; and this would apply equally to lending money to the banking companies.

Then, with respect to the removal of hand-looms and the substitution of power-looms, the Appellant reserved to himself all his rights to object to such removal without his sanction and approbation.

With regard to the agreements with the managers and clerks, of course a manager would have a right to engage and dismiss ordinary workmen; but I do not think he would have any power to bind the partnership by agreements entered into for a term of years, so as to compel it to continue those persons in its employment.

As to the signature of the partnership name, I think that the trustees are bound, under the terms of the partnership deed, to give a procuration defining and limiting the authority of the manager as to granting and subscribing obligations.

My Lords, agreeing, as I do, with my noble and learned friend as to the result of our judgment upon this matter, I have nothing further to say.

LORD WESTBURY concurred, suggesting some verbal corrections improving the "procuration"—for the future guidance of the manager.

The following is the judgment of the House:—

Ordered and adjudged, That the interlocutor of the 20th of July, 1869, so far as it finds that *Robert Beveridge* acted within his powers as manager in the purchase of power-looms for the use of the company, and in the displacement of hand-looms in order to the putting up of such power-looms within the works of the company, be, and the same is hereby reversed. And it is further ordered and adjudged, That the said interlocutor, so far as it finds that the said *Robert Beveridge* acted properly and within his powers in fixing the salaries and emoluments of the persons in the employment of the said company, be, and the same

is hereby also reversed. And it is further declared, that the Defender *Robert Beveridge* has not, apart from his co-trustees, the right to act as a partner of the firm of *Erskine Beveridge & Co.*, and that the rights of the Pursuer, *James Adamson Beveridge*, as such partner, are not superseded or in any respect impaired by the appointment of the said *Robert Beveridge* as general manager thereof; and that the said *Robert Beveridge* has no right, power, or authority to enter into any written or other contracts or agreements with the managers, heads of departments, or clerks of the said copartnership which the firm or the Pursuer, *James Adamson Beveridge*, as a partner therein, disapprove of or object to; and that the said *Robert Beveridge* is bound to accept, and that the other Defenders, as trustees and partners with the Pursuer, the said *James Adamson Beveridge*, are bound to join with the said Pursuer in granting to the said *Robert Beveridge* a written procuration, mandate, or authority authorizing him to sign writs and documents as manager for and on behalf of the co-partnership, and specifying the mode in which he shall sign them, the terms of such procuration, mandate, or authority to be adjusted by the Court of Session in case of difference between the parties.

Agents for the Appellant: *Simson & Wakeford.*
Agent for the Respondents: *William Robertson.*

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Divorce—Consequent Forfeiture of Donatio propter Nuptias—Tocher.

Divorce for Desertion.

Divorce for desertion involves a forfeiture of all claims under a marriage settlement, whether ante-nuptial or post-nuptial; the statute of 1573, c. 55, declaring that "the offenders shall tyne and lose tocher and *donationes propter nuptias*."

Divorce for Adultery.

Divorce for adultery involves the same penal forfeiture as that which arises from divorce for desertion, although the statute is silent as to divorce for adultery.

Per LORD CHELMSFORD:—The penalty is the legal consequence, not of the adultery, but of the decree of divorce:—

Held by the House, that a rule lauded by the highest legal authorities in *Scotland*, and acted upon for centuries, ought not to be disturbed upon appeal.

Tocher.

Per LORD CHELMSFORD:—If tocher be paid over to the husband at the time of the marriage, it may be that upon a divorce on account of his adultery, he may not be bound to restore it.

ON the marriage of the Appellant, Mr. *Harvey*, with Miss *Hunter*, in 1842, there was an ante-nuptial settlement, to which her father was a party. By that settlement Mr. *Harvey* bound himself to pay £4000 to the marriage trustees. On the other hand, Miss *Hunter* made over to them all sums to which she might become entitled by virtue of certain provisions executed in her favour by her father. The object of the trust settlement was to secure to Mr. *Harvey* the interest and annual proceeds of the trust funds "for the maintenance and support of himself and his spouse and family; and on the dissolution of the marriage by the death of either spouse, to pay the interest and annual proceeds to the survivor for life, and after the death of such survivor to pay the principal sums to the children of the marriage equally between them, share and share alike, as they respectively attained the age of majority."

There was also a clause in the settlement providing that should the marriage be dissolved by the wife's death without issue thereof, the trustees should pay back to Mr. *Harvey* his £4000, and pay also the annual income to be derived from the provisions emanating from Miss *Hunter*.

The parties lived together as husband and wife till 1847, and had three children, namely, one son who died in infancy, another son who died unmarried and under age, and a daughter still alive, who is married and has children.

In the year 1848, however, Mrs. *Harvey* obtained a divorce against her husband, the above Appellant, for adultery; and from thenceforth the entire income derived from the marriage settlement was paid by the trustees, not to Mr. *Harvey*, but to his wife: who, having been released by the decree against her husband, entered again into matrimony, becoming, and still continuing to be, the wife of Mr. *Jopp*, of *Aberdeen*.

The divorced Mr. *Harvey* got soon into pecuniary difficulties, and became ultimately a bankrupt, assigning, as such, his property to creditors.

In this situation, conceiving, and being advised, that he had a claim under his marriage settlement notwithstanding the divorce, Mr. *Harvey*, on the 26th of April, 1869, commenced the present action against Mr. *Farquhar*, the sole surviving trustee, concluding for an account of his and of his co-trustees' "intromissions with the interest or annual proceeds of the trust funds received under the settlement," from 1847 downwards; the Pursuer, Mr. *Harvey*, demanding payment of the entire amount in conformity, as he alleged, with the settlement on the marriage.

The main defence against this action was, that by reason of the divorce the income of the trust funds had become payable to the wife. Mr. *Harvey* answered that the sums emanating from the wife (through the provisions of her father) were *tocher*, which a wife was not permitted to reclaim. To this the trustee responded that the sums in question were *not* tocher (1) as they were not demandable till the father's death, which did not occur till 1866.

(1) Tocher corresponds with the *Dos* of the Roman law. It is given on the marriage, and not usually deferred by limitations: See Lord *Neaves* in the Court below, 3rd Series, vol. viii. p. 971. *Appellatur dos, id quod a muliere datur*

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The Court of Session (Second Division) were unanimously of opinion that the sentence of divorce was fatal to Mr. *Harvey's* claim; and they found that there were no grounds set forth to support the conclusions of his summons (1). Hence the present appeal to the House.

The *Solicitor-General* (Sir *George Jessel*), Mr. *Anderson*, Q.C., and Mr. *J. T. Anderson*, appeared for the Appellant:—

They mainly insisted that under the Scotch law there was no real or adequate authority for the proposition that "a husband or wife divorced for adultery loses any part of his or her property in favour of the spouse aggrieved."

The *Lord Advocate* (2) and Sir *Roundell Palmer*, Q.C., urged that the decree appealed from was supported not only by a long series of judicial decisions, but by legal writers of the highest authority, including *Stair*, *Erskine*, *Bankton*, and *Bell*. They also relied much on *Beattie* v. *Johnstone* (3), where a wife, having obtained a divorce on the ground of her husband's adultery, the Court of Session held that she was entitled to an annuity under the settlement precisely as if her husband were dead.

In course of the *Lord Advocate's* address, Lord *Westbury* asked: "If a man has £20,000, and by his marriage settlement secures the interest to himself for life, and after his death to his wife—do you go the length of saying that if he is divorced for adultery, the whole benefit of the £20,000 goes over at once to the wife?"

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viro. Tocher is correctly translated into English by the word *dowery*, "that which the wife bringeth to her husband *in marriage*." Tocher is much prized in *Scotland*. Hence the lines:

"Wha bids the maist is sure to win the prize,
While she that's tocherless neglected lies."

How different is the dower of English law. The tocher or dowery of Scotch law gratifies the husband. The dower of English law consoles the widow. The two things are confounded by *Blackstone* and *Johnson*. Dower in *England* is substantially the same as *Terce* in *Scotland*. In both countries, where land goes exclusively to the eldest son, the law is qualified by allowing a third to the widow for life; not only to support herself, but also for the nurture, maintenance, and education of the younger children.

(1) The case is reported in the 3rd Series, vol. viii., p. 971.

(2) Mr. *George Young*, Q.C.

(3) 5 McP. 340, 5 Feb. 1867.

The *Lord Advocate* replied: "Such undoubtedly is our contention. The husband is regarded as dead. Under the old law of *Scotland* he would have been hanged—notour adultery having been by statute a capital offence." (1)

The Law Peers, having taken time to consider the case, delivered the following opinions:—

THE LORD CHANCELLOR (2):—

My Lords, in this case the Appellant, Mr. *Harvey*, seeks at your Lordships' hands the reversal of certain interlocutors which have been pronounced by the Lord Ordinary and the Court of Session in *Scotland* with reference to certain funds which were settled by a contract which he made upon his marriage with Miss *Hunter*. The marriage appears to have been an unhappy one, inasmuch as not very long after it had been contracted, it was dissolved by a sentence of divorce, pronounced in the proper Court, on account of Mr. *Harvey's* adultery. It is said that the sentence was pronounced in his absence, but no steps have ever been taken to set aside that sentence; and for nearly twenty years this divorce has been in force.

The question is as to the effect of a divorce *à vinculo* upon the interest which Mr. *Harvey* would, except for the divorce, be entitled to under and by virtue of the marriage contract. The marriage contract provided funds derived from two sources: partly from Mr. *Harvey*, the intended husband, and partly from his intended wife's property. It is not very material what the proportions of their several contributions were; they appear to have been about £4000 on the part of the husband, and £1,700, or thereabouts, on the part of the wife; besides certain other provisions made by a bond. These funds were vested in trustees, and the trustees were directed to invest them from time to time in the manner described by the contract of marriage.

What has been decided in the Court below is, that, in conse-

(1) Notour adultery is, by the Scotch Act of 1563, c. 74, made a capital offence. The statute is not repealed, but is of course now in desuetude, although in former times "hanging" took place. In *England*, adultery is a sin, not a crime.

(2) Lord *Hatherley*.

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quence of the divorce, Mr. *Harvey* being the offending spouse, all his interest in the property disposed of by this contract of marriage at once ceases, just as if he were actually dead; and the wife's rights are immediately brought into operation in the same manner as if the offending spouse had pre-deceased her.

The principle of that decision appears to have been settled by authority in *Scotland* for between two and three hundred years. But it is said that the point has never been brought under the consideration of your Lordships' House, and that, therefore, whatever may be the opinion of the Judges in *Scotland*, it is competent for your Lordships to review those decisions, and to see if they rest upon a sound and sure basis, and particularly to examine whether they have not arisen from an error which ought now to be corrected.

As long ago as 1573 a statute (1) was passed in *Scotland* with reference to desertion by a husband of his wife. That statute was framed in a somewhat singular manner. Proceedings were to be taken to establish the fact of wilful desertion—desertion after remonstrance—the party being summoned in the proper way before a Court sufficiently constituted for that purpose, and it was to be ascertained whether he persisted obstinately in his delinquency. If so, a course was prescribed for his excommunication, and then for his divorce; and a forfeiture was declared by the statute undoubtedly of all the goods and provisions made in respect and in consideration of the marriage, whether made from the property of the wife or of the husband. There was some little contest and discussion at your Lordships' Bar as to the husband's property; but I think the statute plainly intimates that all the provisions made in respect of and in regard to the marriage, including the provision made by the husband, were to be forfeited as if the husband were dead; and the Judges have so decided in the present case.

It was then said that by an error originated by one who bears a very great name (Lord *Stair*) the Judges by degrees began to assume that by analogy to this statute they would be entitled to say that in cases of divorce, which would be analogous to desertion on the part of the husband, on the supposed ground that the husband could no longer

(1) Act of 1573, c. 55.

consort with his wife, and that she could no longer be required to consort with him, the same description of forfeiture ought to take place, and that his interest under the marriage contract would, on similar grounds of reasoning, be lost to him by way of forfeiture just as if he had predeceased his spouse.

Now, whatever may be said as to some expressions which are found undoubtedly on the part of the learned Judges to the effect of an analogy having been followed with regard to that statute even down as late as the case of *Beattie* v. *Johnstone* (1) (where, in the opinion of Lord *Curriehill*, something is said which appears to have a little bearing that way), I think your Lordships will be of opinion that the Appellant cannot succeed by resting his case upon that supposed error having prevailed as a ground of decision, because, when the matter is sifted, the argument comes to this—anterior to the Reformation there was no possibility of divorce. That is true as to divorce *à vinculo;* and that being so, it was argued by the Solicitor-General that there cannot have been any common law which authorized this forfeiture, and that the statute law, which was directed against one particular offence—namely, desertion—cannot be extended to another independent offence which it was not intended to strike at. And then he said that there was another, a different statute, by which a forfeiture was effected of the property—or at least the moveable property—of the husband to the Crown, and that it would be inconsistent with such a statute to say that any analogy could now be set up by which it could be said that the property of the offending spouse was not to be forfeited to the Crown, but was to cease for the benefit of the unoffending spouse.

But in pursuing that line of argument it is forgotten that, although there was no divorce *à vinculo*, yet at all times, both when the Roman Catholic Church prevailed in *Scotland*, and also down to the present time, there has been a divorce *à mensâ et thoro* independently and irrespectively of the divorce *à vinculo matrimonii*. It appears by some ancient authorities anterior to the Act of 1573, that with regard to a part of the property a forfeiture did take place as if the husband were dead, upon the simple ground of the divorce *à mensâ et thoro* having taken place upon his adul-

(1) 5 McPherson, 340.

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tery. That appears to have rested in great measure upon doctrines in *Scotland* of a far severer character with reference to adultery than any which exist in this country. Therefore one can see many reasons operating in *Scotland* which would scarcely be held to be a legitimate foundation for similar decisions in our English Courts, and one can understand how it came to pass that a doctrine could be held that forfeiture in respect of the husband's adultery took place exactly in the same manner as if he were actually dead, and removed from any rights under the nuptial contract.

Now, there is a series of decisions from that time downwards, which were said, indeed, in argument to have originated in this mistake of the distinguished jurist Lord *Stair*, but which, if it was a mistake, appears to have been participated in by all the learned Judges who succeeded him, down to the very recent case of *Beattie* v. *Johnstone* (1), where the principle certainly appears to have been tried to the utmost. There the husband having been divorced for adultery, it was held that he was out of the way just as if he were actually dead; and the annuity to the wife, which was only covenanted with the father to be paid to her upon the decease of her husband, not upon his divorce, became immediately payable. The case is a remarkable one, certainly, as carrying the doctrine with regard to adultery to a very great extent.

I do not see in any of the authorities which have been cited that I can find any distinction between the forfeiture of the provision brought in by the wife and the forfeiture of any provision made by the husband; it is simply a forfeiture of all his rights under the marriage contract, which takes place just as if he were actually dead.

In my judgment the decision of the Court of Session ought to be affirmed, and the appeal dismissed with costs.

LORD CHELMSFORD:—

The funds which form the subject of contest were to be held by the trustees in trust during the joint lives of the two parties, for the maintenance and support of the Appellant and his spouse and family; and upon the death of either of the spouses the interest

(1) 5 McPherson, 340.

was to be paid to the survivor; and upon the death of the survivor the principal sum was to be divided equally amongst the children of the marriage.

It is unnecessary to dwell upon the argument which was first addressed to us on the part of the Appellant, that there was no law in *Scotland* that a husband divorced for adultery forfeits anything, but (as was said) that after the passing of the Act of 1573, which provided for a divorce for non-adherence, the Judges made the same law applicable to a divorce for adultery.

I think there is ample proof that before the Act of 1573 the law of divorce for adultery existed by the common law. It is true that before the Reformation there could be no divorce *à vinculo*, but there were divorces for adultery *à mensâ et thoro;* and the same consequences followed from these divorces, and attached upon the guilty party, as from divorces *à vinculo.*

It is admitted that there are several authorities in support of the position that upon a divorce for adultery the offending party loses all the benefit which he is entitled to under the marriage contract. But these decisions have never been appealed from, and the Appellant questions their propriety. It is, however, a strong presumption in their favour that they have been acquiesced in for many years, and that such institutional writers as Lord *Stair*, Lord *Bankton*, *Erskine*, and *Bell* have treated the law upon the subject as settled.

Some question was raised, indeed, as to the authenticity of the passage cited from Lord *Stair* (1), where he speaks of marriages dissolved by divorce either upon wilful non-adherence or adultery, giving to the party injured the same benefit as by the other's natural death, in so far as the words "or adultery" are contained in it. But we cannot entertain any doubt of the accuracy of the printed edition of *Stair* when we are informed that in no fewer than nine MSS. of this work in the Advocate's Library, the words "or adultery" are to be found.

It is, however, argued that the forfeiture which is incurred by the husband's adultery, and consequent divorce, must be confined to the benefit which he derives from his wife's fortune. But there is no ground for such an argument if the bond for £4000 provided

(1) Book i. tit. 4, s. 20.

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by the Appellant in the marriage contract is a *donatio propter nuptias*, which, it may be observed, is something different from a tocher, as the Act of 1573 makes a distinction between them in providing that "the party offender shall tyne and lose the tocher and *donationes propter nuptias*." The tocher I understand to be the marriage portion or *dos* which the wife brings to her husband. If that be paid over to the husband at the time of the marriage, it may be that upon a divorce on account of his adultery he may not be bound to restore it. But if the effect of such a divorce be that the provisions of the marriage contract are to be dealt with as if the offending party were naturally dead, there is no reason to be given why, upon such an event, the interest of the offender in a *donatio propter nuptias* should not cease, and the right of the innocent party immediately commence and take effect.

A rather extraordinary argument was addressed to us on the part of the Appellant, to prove that there was no forfeiture of his rights by the divorce. It is provided by the marriage contract that the sums of money falling under the trust shall not be subject or liable to his "debts, or deeds, or the legal diligence of his creditors." It was said that "deeds" here means acts, and that the divorce was the act of the Appellant because his adultery was the cause of it. Now, although the word "deeds" may mean every act of the Appellant by which the trust moneys may be transferred from him, I am at a loss to see how the divorce can be an act of this character attributable to him, since it is not his act at all, but only a consequence of his act, and the loss of his interest in the trust funds is the legal consequence, not of his adultery, but of the decree of divorce.

It is also said that the provisions in the marriage contract being of an alimentary nature, the clause as to the trust moneys not being subject or liable to the Appellant's debts or deeds, prevented his conveying or forfeiting his interest under it. That he had no power to convey his interest while the marriage subsisted is unquestionable. I consider the clause in question to be intended to protect the wife and family against the acts of the husband, by which they might be deprived of the maintenance and support provided for them by the marriage contract. But the loss of the husband's interest in the fund as a consequence of the divorce does

not deprive it of its alimentary character; and as the effect of the divorce is to treat the interest of the Appellant as if he were naturally dead, I do not see how a clause which relates to his acts and deeds can, after the divorce, have any operation.

On the whole of the grounds upon which the interlocutor of the Court of Session proceeded, having been so long regarded as the law in *Scotland*, and there being no decision that I am aware of opposed to it, if I entertained a doubt upon the subject (which I certainly do not) I should hardly feel myself at liberty to give effect to it. But being satisfied that the interlocutor appealed from is correct, I am of opinion that it ought to be affirmed.

LORD WESTBURY:—

We have been asked here to reverse not only a great number of decisions, but also to overrule a principle which appears to have been long incorporated into the law of *Scotland*, and to have become an established institution in the marriage law of that country. The rule is one which I am by no means surprised to find, having regard to the extreme severity which that country once manifested upon the subject of adultery.

Although in a marriage contract there be included property contributed by the husband and property contributed by the wife, it is a *donatio propter nuptias*, in the sense in which that phrase is used in the Scotch law; and the result therefore is, that the husband's loss or forfeiture in the case of a divorce for adultery is not limited to the property of the wife, but extends to the whole of the property, whether brought within the operation of the *donatio propter nuptias* by himself or by his wife.

Now with regard to tocher, which is a sum paid by the intended wife to the intended husband *intentu matrimonii*—when it is accompanied by a settlement or *donatio propter nuptias*—it must be regarded as a consideration paid by the wife for the provisions contained in that *donatio*. Of course if the wife claims the benefit of those provisions, she cannot at the same time claim restitution of the tocher, which is the consideration for what remains to her under the marriage contract.

Now there is a direction in the marriage contract for the payment of the income to maintain the husband and the wife and the

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children of the marriage; and there can be no doubt that by the law of *Scotland*, in the case of a husband's divorce for adultery, the interest which the husband has in that joint trust, or direction, becomes extinct for the benefit of the wife, and, through the wife, of the children of the marriage. I think, therefore, that the decision in this case is most unquestionably in strict conformity with the rule of law in *Scotland*. And, my Lords, it is by no means the function of this House, when sitting here as an Appellate Tribunal, to alter rules of law which have long been established, long accepted, and long acted upon in the Courts of that country in which the decisions appealed from have been pronounced. I regret very much that this appeal should have been presented after so long a period of time; but what your Lordships are bound to do is, I think, to dismiss it, and to dismiss it with costs.

Interlocutors affirmed, and appeal dismissed with costs.

Agents for the Appellant: *Simpson & Wakeford.*
Agents for the Respondents: *Grahames & Wardlaw.*

1872
March 11.

MRS. MACKENZIE CATTON AND HER HUSBAND . . . . . } APPELLANTS;
KENNETH MACKENZIE OF DUNDONNELL RESPONDENT.

Strict Entail—Relaxation of Fetters for the Benefit of Younger Children.

A power to grant a certain number of years' free rent as a provision for younger children is an ordinary power in deeds of entail. It is introduced as an exception to the general restrictions. "Younger children" are those who are such at the death of the institute or heir in possession.

Per THE LORD CHANCELLOR:—The Act of 1685, c. 22, and the *Rutherfurd Act*, 11 & 12 Vict. c. 36, both allow a provision for younger children in the form here adopted.

Per LORD WESTBURY:—This deed of entail contains, with regard to the *corpus* of the estate, completely valid and effectual fettering clauses. The fetters are relaxed for the benefit of younger children, but in a manner which shall not admit of any alienation or mortgage of the *corpus*.

Procedure.

Judgment of the Lord Ordinary on one branch of the case. Judgment of the First Division on another branch, recalling the Lord Ordinary's judg-

ment. Judgment of the House of Lords, recalling the judgment of the First Division, and restoring that of the Lord Ordinary:

Per THE LORD CHANCELLOR:—The First Division passed by the question on which the Lord Ordinary proceeded.

Per LORD CHELMSFORD:—I cannot help regretting that we have not had the advantage of the opinions of the learned Judges of the First Division, as the case is one of the first impression; as to which their judgment would have been pre-eminently useful.

IN 1838 the late Mr. *Murdo Mackenzie*, being then owner in fee simple of the *Dundonnell* estate in *Rosshire*, executed an entail of it in the form of a procuratory of resignation for new infeftment to be granted to *Hugh Mackenzie*, "his eldest son, and the heirs whomsoever of his body; whom failing, to *Kenneth Mackenzie*, his second son, and the heirs whomsoever of his body," &c.

Murdo Mackenzie, the maker of this entail, dying in 1845, his eldest son, *Hugh*, took possession as institute, and duly completed his title by infeftment. Besides *Dundonnell*, he had other estates in *Rosshire*, which he held in fee simple. He died in 1869, without any legitimate issue, but left a daughter, the anxiety to provide largely for whom having apparently given rise to the present litigation; for it appeared that in 1854 *Hugh Mackenzie* executed a trust disposition and settlement, whereby he conveyed to trustees sundry "lands, heritages, and sums of money," constituting his whole property, in order that after payment of debts it should be held "for her behoof alone; it being his wish and intention that she and her heirs should succeed to everything he might leave, with unlimited power to dispose thereof as she pleased." In 1868 she married Mr. *Catton*, who on her father's death claimed the *Dundonnell* estate, alleging that the entail was invalid, and that the deceased had held it "as a *fiar*, unrestricted by fetters," so that it passed to Mrs. *Catton* under the trust disposition and settlement.

On the 7th of July, 1870, the Lord Ordinary (1) gave judgment to the effect that the *Dundonnell* entail was in all respects valid, and wholly undisturbed and unaffected by the trust disposition and settlement relied upon by Mrs. *Catton* and her husband, who thereupon presented a reclaiming note to the First Division of the Court of Session against the Lord Ordinary's interlocutor.

On the 19th of July, 1870, the Lords of the Second Division, after

(1) Lord *Mackenzie*.

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hearing counsel, "recalled the Lord Ordinary's interlocutor, and sustained the Defender's second and third pleas in law," in effect deciding that, even on the assumption that the *Dundonnell* entail was defective, it was nevertheless untouched by the trust disposition and settlement, which evinced no intention on the part of the maker thereof to convey the *Dundonnell* estate to his testamentary trustees; in other words, to Mrs. *Catton*.

Against this decision of the Second Division Mrs. *Catton* and her husband presented their appeal to the House of Lords, having for their counsel Mr. *Pearson*, Q.C., and Mr. *J. M. Duncan*, who urged in the first place the invalidity of the *Dundonnell* entail, as it contained no effectual prohibition against the contracting of debt or against the selling of the lands. They further insisted that there was no declaration of irritancy of any adjudication that might be obtained or used against the fee of the estate; the restrictions being subject to exceptions which gave the institute and the heirs respectively power, among other things, to make provisions for younger children to the amount of at least three years' free rent of the estate.

The Appellants' counsel contended, secondly, that the trust disposition and settlement containing a clause of general conveyance of both heritable and moveable property was sufficient, by the law of *Scotland*, to pass all that belonged to the maker in fee simple at his death, including the *Dundonnell* estate, of which they contended that he was *fiar*, inasmuch as the entail was defective and invalid (1).

The *Lord Advocate* (2), Sir *Roundell Palmer*, Q.C., and Mr. *A. B. Shand*, for the Respondent, were not called upon.

The Law Peers, however, took time to consider of the case, delivering ultimately the following opinions:—

THE LORD CHANCELLOR (3):—

My Lords, in this case the Lord Ordinary was of opinion, and gave judgment in favour of the Respondent, holding that the

(1) The argument of the Appellants' Counsel is fully commented upon in the opinions of the Law Peers: see *infra*.

(2) Mr. *Young*, Q.C. (3) Lord *Hatherley*.

entail was good; and, therefore, that the *Dundonnell* estate could not pass by any testamentary disposition in favour of Mrs. *Catton*.

The case having been brought before the Lords of the First Division, they passed by the question as to whether or not the entail was effective; and passing by that question, they on another ground came to a conclusion also in favour of the Respondent; holding that the deed of disposition and trust was insufficient to pass the *Dundonnell* estate to Mrs. *Catton's* trustees.

But, my Lords, we in this House were very desirous to hear a full argument as to the validity of the deed of entail; for certainly the doctrine that was contended for on behalf of the Appellants was exceedingly wide in its extent and consequences. Mr. *Duncan* most ably argued the case, and most clearly brought out the points which he undertook to sustain in objection to the deed of entail. He, however, admitted that the question was one affecting the validity and sufficiency of a very large number of entails made under the Act of 1685, c. 22.

Now, with the exception of the provision which might be made for younger children upon the part of the institute or of the subsequent heirs of entail, there was a sufficient prohibition against incumbering the estate, charging it with debt, or alienating it. So far the deed is admitted to be an effective and valid deed under the Act of 1685. There was in the instrument a provision by which a sum not exceeding three years' free rent might be charged for the benefit of younger children, either upon the part of the institute or upon the part of the heir of entail. The argument has been this, that if you look to the words by which provision is allowed to be made for younger children to the extent of three years' rent, the deed of entail is invalid under the Act of 1685 as not having complete and perfect prohibitions properly and adequately fenced with regard to charging and incumbering the property. The mischief which was intended to be dealt with by the *Rutherfurd Act* was this: There were not unfrequently entails under the Act of 1685 in which particular persons in possession might not have been sufficiently provided against in reference to their acts or deeds in regard to dealing with the property. The *Rutherfurd Act* said that it should not be left to the uncertain and unsettled state—that if one heir could dispose of it, then it should be open

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to every heir who came into possession to deal with it as if it were an estate which was not subject to the restrictions imposed upon it by the stringent provisions of the Act of 1685. So, again, with reference to incumbering or charging. If it was in the power of any one of the heirs of entail to charge, or incumber, or dispone the whole or any part of the property without any definite purpose being specified, like a provision for younger children, then in order to avoid the inconveniences which were found to arise from having estates unreasonably fettered, advantage should be taken by each and all of the heirs of entail of doing that which any one of the heirs of entail might do from the want of adequate provision being made with regard to securing the property against his acts or incumbrances. But to say that such a result is to follow if there is any power reserved of relaxing the fetters for any special given purpose, such as a provision for younger children, defined and limited as it is here, appears to me to be an unreasonable conclusion to arrive at. It was candidly admitted by Mr. *Duncan* that the determination in support of which he has argued is one which has never yet been arrived at, although there are numerous instances in which, if your Lordships should now for the first time so decide, the point might arise, and entails which exist in large numbers under the Act of 1685, hitherto unimpeached by the operation of the 43rd section of the *Rutherfurd Act*, would be effectually destroyed. That of itself seems to me to be a sufficient reason why one should be very careful in holding that if there be any remission or relaxation of the fetters imposed upon an estate with regard to this distinct and specific purpose, that circumstance should not lead your Lordships to come to the conclusion that the whole entail of the estate is destroyed.

Now the particular questions which are raised in this case are, some of them, of the very minutest description; and I prefer resting upon the broader ground, that a case in which a provision is made for younger children in the way in which it has been here made is not a case to which the 43rd section of the *Rutherfurd Act* has any application at all. Of course one agrees at once with the argument of Mr. *Duncan* that you cannot give a man a charge and say that he shall not exercise all his remedies for that charge, but there is no more difficulty in the Scotch law than in the

English law in providing security for the payment of the money, and the mode of payment, so that there shall never be execution against the estate on the part of the creditor.

The charge in this case is entirely for the benefit of younger children, and authorities are cited in the case of the Respondent which seem to hold in the Scotch law, as we do in the English law, that the position and *status* of younger children is a matter not to be ascertained until the death of the parent; because the construction in Scotch law as in English law is that the younger child is unprovided for in this sense, that the child does not take the estate. The heir according to the destination succeeds to the estate under the entail, and the younger children are unprovided for at the death of the parent, whether he is the institute or one of the heirs in succession. At his death it is ascertained who are the younger children unprovided for, so that leaving this matter open as regards the institute, it would not be a fatal objection (if it could at all prevail, which I think it could not) as to the relaxation not having been made in his case in such a manner as to enable him to charge the estate contrary to the general prohibitions. But these are mere matters of detail. And when the case stands upon a ground of such importance as this case does stand upon, as affecting all dispositions of Scotch property under deeds of entail, I very much prefer resting the decision upon this ground, which I trust will be your Lordships' opinion, that the 43rd section of the *Rutherfurd Act*, dealing with invalid entails, does not include the case of a provision being made for younger children in the mode and form in which it is here made, and that when the fetters are relaxed to that extent and for that purpose they are not so relaxed as to enable the estate to be dealt with in a manner contrary to the provisions of the statute.

My Lords, I think that the decree of the Lord Ordinary was perfectly right; and I presume that the course now to be taken will be to recall the decision of the Inner House, and to affirm the decree of the Lord Ordinary.

LORD CHELMSFORD:—

As your Lordships have arrived at the conclusion that this appeal may be satisfactorily determined upon the question of the

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validity of *Murdo Mackenzie's* entail, I cannot help regretting that we have not had the advantage of the opinions of the learned Judges of the Court of Session on the subject; as it is admitted that there are no previous authorities to guide us, but that the case is one of the first impression, to be decided upon principle; as to which the judgment of those familiarly conversant with the law of Scotch entails would have been pre-eminently useful.

After the best consideration I have been able to bestow upon the subject, and notwithstanding the very able arguments of Mr. *Duncan*, I have satisfied myself that there is no ground for impeaching the validity of this entail.

Before the passing of the *Rutherfurd Act* an entail made under the Act of 1685, c. 22, in which any of the prohibitions contained in it were not fenced by proper irritant and resolutive clauses was void only as to that prohibition, and effectual for the rest. But by the 43rd section of the *Rutherfurd Act* (11 & 12 Vict. c. 36):

> Where any tailzie shall be invalid and ineffectual as regards any one of the prohibitions against alienation and contraction of debt and alteration of the order of succession, it shall be deemed and taken to be invalid and ineffectual as regards all the prohibitions.

The objection made to the present entail is, that it contains no effectual provision against burdening the estate with the payment of debts. The entail is made

> under the limitation and restriction that it shall not be lawful for *Hugh Mackenzie*, or the heirs of entail, to sell, dispone, alienate, burden, dilapidate, and put away the lands, or to contract debts, &c., or any ways to affect or burden the same, under this exception, that it shall be lawful for them, notwithstanding the limitations before written, to provide their children with three years' free rent of the said lands and estate.

The irritant clause provides that

> if *Hugh Mackenzie*, or the heirs of tailzie, shall contravene any of the conditions, provisions, or limitations, by acting contrary to them, or any of them, excepting as is above excepted, the person so contravening shall forfeit all right, title, and interest to the foresaid lands and estates.

It was argued on behalf of the Appellants that the effect of the exception of the provision for younger children was to enable *Hugh Mackenzie*, or the heirs of entail, to burden the lands and estate. This, it was contended, was shewn by the clause declaring

that where such power has been exercised, it shall not be lawful or in the power of any subsequent heir of entail to burden the lands and estate with new provisions until the former provisions are satisfied and paid, and by the following words, "that the lands and estate shall at no time be burdened with provisions to younger children to the extent of more than three years' free rent thereof," the words, "three years' free rent," it was said, merely limiting the quantity of the burden. It was therefore insisted that the irritant clause referring to the above exception rendered it imperfect, and that there was no fence against the burdening of the estate; and consequently the whole entail was invalid.

I certainly am disposed to think with the Lord Ordinary, that the fair construction of the exception is, that it merely confers a power on the institute and each succeeding heir of entail to grant provisions of three years' rent to those of his children who should occupy the position of younger children at the time of his death.

I agree that the established rule in construing entails is, in cases of doubt, to adopt that construction which will release the estate from the fetters; but that rule does not appear to me to be applicable here. This is not a question as to the meaning of the fencing clauses of the entail, but as to the extent of an exception out of the limitations and restrictions imposed upon the institute and the heirs of entail, and the consequent reference to this exception in the irritant clause. Now the exception is to provide the younger children with three years' free rent of the lands and estate. This is an ordinary provision for younger children in deeds of entail. And the following words against burdening the lands with further provisions till the former ones are paid, ought, in my opinion, although inaccurately expressed, to be construed as prohibiting any further provisions being made of the rents till those for the three years have been satisfied. And I put the same construction upon the words, "so that the lands and estate shall at no time be burthened with provisions to younger children to the extent of more than three years' free rent;" which may mean, and I think ought to be construed to mean, that there shall be no obligation to provide free rents of the lands and estate beyond three years.

I am a good deal influenced in my view of this provision for

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younger children from its following a restriction upon any ways affecting or burdening the estate, and being followed by a clause, that "no adjudication or other legal execution shall lie or be competent against the fee or property of the lands and estate, or any part thereof, for payment of such provisions to younger children." Now if the provisions to younger children were a burthen upon the estate, this exemption of the lands and estate from execution for payment of the provisions would be utterly void; and therefore it appears to me that the intention of the parties as to the nature of these provisions being clearly expressed originally, it ought not to be affected by any inaccurate description in the reference to the provisions afterwards.

But assuming that the proper construction of the provision for younger children extends it not merely to the rents, but to the estate itself, then the effect of it will be that the estate, to the extent of this provision, may be altogether removed and withdrawn from the prohibition of the entail. Consequently the exception out of the irritant clause in no way disables it and renders it invalid and ineffectual as regards the prohibition against burdening the estate, but merely expresses that it shall not extend to the portion of the estate which would thus be withdrawn from the entail.

The conclusion at which I have arrived is, that the provision for younger children either is confined to the rents of the estate, and therefore is not a burden *upon* the estate, and consequently does not offend against the prohibitory clause, or that if it is to be regarded as giving a power to make a disposition of the estate itself for the provision for younger children, the irritant clause excepts it as not within its province; that clause being a perfect fence against a disposition of the rest of the estate. *Quâcunque viâ*, therefore, it appears to me that the entail is valid.

I think that the appeal should be disposed of as proposed by my noble and learned friend.

LORD WESTBURY:—

My Lords, in the Court below there were two issues. One that this was an imperfect, and, therefore, an invalid deed of entail. The other, that the deed of entail, being invalid, the estate passed

under the residuary gift contained in the trust settlement of Mr. *Hugh Mackenzie;* and that that residuary gift was of sufficient power to evacuate the destination contained in the deed of entail. Now, if the first issue be found in favour of the Respondent, the second issue does not arise. And the more natural course, therefore, is to consider the first issue.

I thought that ingenuity had been exhausted in raising questions upon the Act of 1685; but that does not appear to be the case. And accordingly we have now an attempt to impeach an entail on the ground of its being imperfect, although with regard to the estate, so far as it is left within the operation of the fettering clauses, there is no attempt to contend that any portion of the fettering clauses is invalid or ineffectual as a proper fetter in the deed of entail.

The allegation here has reference to the exception allowing a modified provision for younger children. The Appellants say that that exception relaxes the fettering clause so far as to admit of the estate being dealt with to a limited extent, and that therefore that exception prevents the operation of the deed as a complete deed of entail; and therefore brings it within the operation of the 43rd section of the *Rutherfurd Act.*

Now, I do not mean to say that if there be an exception enabling you to relax the estate from the fetters of the entail to a considerable extent, and enabling you to burden or dispone the estate by virtue of that exception, so as to withdraw from the fetters a portion of the principal of the estate, there might not be some validity in the argument, or at all events some reason for considering it well before you came to the conclusion that such general provision might be inserted in the deed of entail. But that is not the case here.

But the exception here making the estate liable to a particular charge limits the amount of the charge, and is so carefully worded that it does not open the door to charging the principal of the estate, or disposing or alienating of it. The sums which the heir of entail is enabled to raise for younger children, is to be sought only as against the rents and profits of the estate. Accordingly, the exception is guarded by a due set of restrictions—that no advantage shall be taken of it to subject the estate to any adjudication;

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neither shall advantage be taken of it to enable the heir of entail to dispone or sell any part of the estate. Consequently the ordinary remedy of a mortgagee, or of a bond creditor, or of a judgment creditor, or of an alienee, is entirely excluded. The only thing that is given is the power to raise three years' rent out of the rents of the estate. The exception cannot be made the means of withdrawing any portion of the principal of the estate from the fetters of the entail.

Well, now, is there any objection to this? It has been done in hundreds of entails. It exists at this present moment in, I dare say, a very great number of deeds of entail, and if it were possible now at this time of day to open the door to another doubt upon the effectual operation of the Act of 1685, we should unsettle an enormous number of titles by reason of our entertaining a doubt which has not been thought of up to the present moment. For it was candidly admitted by the counsel for the Appellant that they could cite no case, nor even a dictum, to the effect of warranting the general proposition that a limited provision for younger children, so guarded that it cannot be made a means of destroying the effect of any one of the fettering clauses would be an objection to the validity of the entail under the statute.

Your Lordships will observe that this is not a faculty. It is an exception. It is a provision undoing the fetters to a certain extent, and the limitations upon the use of the power are part of the exception itself. The fetters are relaxed and fall off from so much of the estate as will enable you to raise the amount of the three years' free rent, and to raise it in a manner which shall not admit of adjudication, or alienation, or of mortgage of any part of the principal. It is impossible to hold that that has the effect of withdrawing any part of the principal of the estate from the fetters of the entail. Entails are made, and have been made for centuries, with provisions for limited purposes relaxing the fetters in a certain definite and restricted manner in order to accomplish those purposes, as in the case of granting feus of small plots of land for building purposes; but these provisions are quite consistent with the maintenance of the entails.

It was objected that the fencing clauses which accompany the exception itself were bad, because they did not apply to the insti-

tute. It is quite clear that they could not apply to the institute, for the provision, or exception, only becomes available, in the case of the institute, at the death of the institute, when the objects entitled to the benefits of the exception can for the first time be ascertained.

There were two or three other exceptions which I think were not much relied upon here, but which appear to have been taken before the Lord Ordinary. One was as to whether the words "acts and deeds" extended to prohibit alienation and so forth. Those points, I think, are hardly worthy of the attention they seem to have been regarded with by the Lord Ordinary, and here, I think they were, very rightly, not insisted upon.

What, then, is the result? It is unquestionable that this deed of entail contains everything which the statute requires. It contains, with regard to the whole *corpus* of the estate, completely valid and effectual fettering clauses. It relaxes those clauses only to the extent of three years' rent to be received and recovered as rent, and that for a purpose which was consistent with the object of the settlement. We should do very great mischief if we encouraged ingenuity further than it has hitherto been encouraged in discovering doubts as to the operation of the *Rutherfurd Act.* The statute requires that which I have stated to your Lordships, and we have it here. In this case the fetters of the entail are relaxed for a purpose which is usually provided for in all settlements, and which will certainly be found in a great majority of the settlements constructed under the Act of 1685.

I think, therefore, that this attempt to impugn this entail has failed in every respect. There is no colour for it, either in the language of the statute or in the language of the deed of entail. Nor is there any support for it to be derived from authority, nor even from what are called in *Scotland* (with very great comprehensiveness of name) text-writers. And I think your Lordships will feel considerable satisfaction in discouraging attempts of this kind by dismissing the appeal as thoroughly unfounded, and by dismissing it with costs. But in doing so we must provide for the peculiar mode in which the case has been disposed of in the Court below. The Lord Ordinary pronounced for the validity of the entail. The Inner House recalled the Lord Ordinary's inter-

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locutor, not because it was wrong, but because they thought it preferable that the judgment should be upon the second issue instead of the first. I submit to your Lordships that we must recall that interlocutor, because that interlocutor recalls the interlocutor of the Lord Ordinary; and, therefore, I should propose to your Lordships to make your order in this form :—Recall the interlocutor of the Inner House, save so far as it finds the Pursuer liable to the expenses; and affirm the interlocutor of the Lord Ordinary, and direct that the Respondent's costs in this appeal be borne and paid by the Appellants.

Judgment accordingly.

Agent for the Appellant: *John Graham.*
Agents for the Respondent: *Loch & MacLaurin.*

1872
April 22.

FORBES . . . . . APPELLANT;
WATT . . . . . RESPONDENT.

Lease—Evidence—Construction.

Where documents are obscure, but where parties have long acted on the footing of a given practical construction, the Court, in the absence of better evidence, will accept that construction as correct.

THE action in the present case was brought by Mr. *Forbes*, as proprietor of the lands of *Crombie* and *Tillyfaff*, in the county of *Banff*, to obtain a judicial declaration that he was the absolute owner of the said lands, and that the Defender, *Charles Watt*, had no valid lease or tack of them, and ought to be removed.

There was a subordinate question—whether, supposing the lease to be established, it included a parcel of land called *Scotsward*, adjoining the other premises.

It appeared that Mr. *Forbes* had purchased the estate from the Earl of *Seafield* in 1859, with ample notice of all material particulars relating to it, and, of course, not without some intimation of the claims of Mr. *Watt*.

The Court of Session gave judgment in favour of Mr. *Watt*,

deciding, that although Mr. *Forbes* was unquestionably proprietor of the lands in question, it was equally clear that Mr. *Watt* had a lease of them, which was traceable back for nearly a century, his title not expiring till the death of a Mr. *Wilson*, represented in the pleadings as "still alive."

Against this judgment Mr. *Forbes* appealed to the House, having for his counsel, The *Lord Advocate* (1), Sir *Roundell Palmer*, Q.C., and Mr. *Wotherspoon*.

The *Solicitor-General* (2), and Mr. *Charles Scott*, appeared for the Respondent.

At the close of the argument,

THE LORD CHANCELLOR (3) went fully into the evidence, the question being one almost wholly of detail. His Lordship, agreeing with the Court below, observed that "this unfortunate litigation was very unnecessary, regard being had to the terms under which the purchase had been made, and the difficulties which existed in throwing light on the obscurities of documents, there being nobody now alive to expound them." His Lordship concluded as follows:—

I do not see any sufficient reasons to induce me to doubt that the learned Judges in the Court below have come to the right conclusion. Therefore, my Lords, I move that the interlocutors appealed from be affirmed, and that the appeal be dismissed with costs.

LORD CHELMSFORD:—

The Appellant bought this property from Lord *Seafield* upon articles and conditions of sale, and upon the measurements of each lot as stated in the plans and upon printed rentals. Now, by the rental and measurement the possession is stated to be the *Mains of Crombie*, the tenant *Charles Watt*, with a measurement of 616A. 1R. 32P., and the expiry of the lease is stated to be *Robert Wilson's* lifetime. Now, these dimensions of 616A. 1R. 32P. include the lands of *Tillyfaff* and *Scotsward*. The Appellant purchased,

(1) Mr. *Young*, Q.C. (2) Sir *George Jessel*. (3) Lord *Hatherley*.

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therefore, with notice that *Watt*, the tenant, held *Tillyfaff* and *Scotsward* as part of the *Mains of Crombie* on *Wilson's* life, and he cannot now claim them from the tenant as belonging to himself, unburthened by any lease. I am, therefore, of opinion, with my noble and learned friend, that the interlocutor ought to be affirmed.

LORD COLONSAY:—

My Lords, the question to be determined is, whether the Respondent, who now holds those lands of *Tillyfaff* and a parcel called *Scotsward*, is entitled to hold them during the life of Mr. *Wilson*.

Now, it appears that the matter was treated, both by the landlord and by the tenant, as if the right of the tenant depended upon the life of *Wilson*. It is clear that the tenant so dealt with it because he disposed of it, and it passed from hand to hand upon that footing; I think it is clear from the factor's book that the landlord also so treated it.

But it is said that a lease of this kind cannot be effectual against a purchaser unless constituted by writ. Here there is writ, and the question comes to be, whether the minute which constituted the lease admits of a construction such as has been given to it by both parties. I think it does; and assuming it to be of doubtful construction, I apprehend that the construction given by both parties would be the construction which your Lordships would adopt. Another question might arise, whether the entries in the landlord's rental book, and the acceptance of the rent, and the dealings with the tenant, might not themselves be referred to by the tenant as evidence of the lease.

Therefore, in that state of things; the document admitting of more than one construction, which is not wonderful, seeing that it was written by the local factor, and framed by reference to something else (a very dangerous mode of framing a document), I think we are brought back to the question, what is the construction that the parties themselves put upon it?

I see there has been a difference of opinion among the learned Judges below as to which portion of the lands the parcel called *Scotsward* belongs to; but if it belongs to the one or the other

part, I do not think that the doubt or the conflict of evidence as to *which part*, is a thing that the landlord can take advantage of in order to shew that the tenant has no title to it. On these grounds I think that the judgment of the Court below ought to be affirmed.

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Interlocutors affirmed, and appeal dismissed with costs.

Agent for the Appellant: *William Robertson.*
Agent for the Respondent: *R. M. Gloag.*

THE LORD ADVOCATE OF SCOTLAND (1) . APPELLANT;
MAJOR-GENERAL HAGART *et al.* . . . . RESPONDENTS.

1872
May 2.

Inventory Duty—5 & 6 *Vict. c.* 79, *s.* 23.

When the provisions in a marriage settlement constitute a debt, inventory duty is not chargeable.

Children's Provisions.

In a marriage settlement the husband became bound to make a provision for his children, the contract giving him a power of appointment, in the exercise of which power he appointed to one of his sons £10,000, which was duly paid to him. The executors claimed a return of duty in respect of this sum, on the ground that it constituted a *debt* of the deceased:—

Held, that their contention was right, and that they were entitled to a return of £150.

ON the marriage, in 1813, of Mr. *Thomas Campbell Hagart*, of *Bantaskine*, with Miss *Stewart*, of *Westforth*, an ante-nuptial contract was entered into; not only the intended husband and wife, but also their respective fathers, being parties to it.

The deed contained an obligation on the part of the intended wife's father, Mr. *Stewart*, to settle on herself and her children £10,000; the intended husband, Mr. *Hagart*, and his father, on the other hand, binding themselves to secure for her a free life-rent annuity of £800, and both the father and son bound themselves "to lay out *a capital sum* on good security" to satisfy the provision "for the said *Thomas Campbell Hagart* and the said *Elizabeth Stewart* in conjunct fee and life-rent; for her life-rent use allenarly

(1) Mr. *Young*, Q.C.

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in case she survived him; and to the children to be procreated between them; whom failing, to the said *Thomas Campbell Hagart*, his heirs and assigns whomsoever, in fee." The contract stipulated that it should be in the power of the husband, Mr. *Hagart*, to divide and apportion, as he should think proper, the fee of the said capital sum among the children to be procreated of the marriage.

Very soon after this marriage the father of the husband died, leaving to the husband, his only son and next of kin, a net residue of £30,000.

The husband himself died on the 24th of September, 1868, survived by two sons and two daughters, as well as by his wife, who, however, herself departed this life on the 11th of October, 1869.

It appeared that by a trust disposition and settlement, dated the 25th of August, 1858, Mr. *Hagart* directed his trustees to pay to his second son, now Lieutenant-Colonel *James Hagart*, £10,000; declaring by a codicil that the sum so provided for his second son "should be in lieu of any share which he might be entitled to claim under the contract of marriage aforesaid," and also declaring that "the said provision to his second son should be held and taken as an exercise of the power of division of the capital conferred by the contract."

The executors appointed by Mr. *Hagart's* trust disposition and settlement duly paid to Colonel *Hagart* the sum of £10,000, conformably to the father's direction. But believing that they had overpaid the Government under the Revenue Statutes, they brought an action (out of which the present appeal arose) against the Lord Advocate, as representing the Crown, for a return to them of £300, on the ground that the £10,000 was a *debt*, and consequently was not subject to inventory duty.

The Lord Ordinary (1) held that the executors (the above Respondents) were entitled to the return of duty which they claimed to the extent of £150, with interest at the rate of 5 per cent. His Lordship explained and supported his judgment by the following note:—

The Lord Ordinary thinks the £10,000 is a debt due and owing from the deceased; for by his ante-nuptial contract of marriage—a deed of a highly onerous

(1) Lord *Mackenzie*.

character—he, in respect of a large tocher brought to him by his wife, and other stipulations come under by her, and in respect of the contemplated marriage, bound and obliged himself, his heirs and representatives, to lay out and secure a much larger sum than £10,000, the fee or capital of which was to be taken payable, and—in the circumstances which occurred—became payable to the younger children of the marriage.

It may be that such a provision, in favour of children *nascituri*, is not a debt in the sense of its being entitled to be ranked in competition with ordinary creditors of the father; but still it is of the nature of a debt due by him, which it was beyond his power directly and by any gratuitous or voluntary deed to extinguish, except by payment of the creditor therein. Nor is it of any consequence that the general provision as it existed in the marriage contract was converted into a £10,000 provision, by virtue of the power of apportionment reserved to his father; for this, and indeed nearly all of the points which here arise, were fully considered, and disposed of favourably for the contention of the Pursuers, in the case of *The Advocate-General* v. *Trotter* (1). The Lord Ordinary refers especially to that passage of Lord *Fullerton's* judgment in which he lays it down that provisions to children by marriage contract are rights of credit created by deed *inter vivos*, of a peculiar and modified kind—an inference of which every one must admit the justice. But, on the other hand, it is equally clear that they are, neither in form nor in substance, gifts by testamentary instruments, being the character which is indispensable to subject them to the liability for legacy duty.

In support of the same view, reference may also be made to the authority of Mr. *Erskine*, by whom it is stated (3,8,38) that a child can enforce implement of marriage contract provisions against his father, and that he may do so without serving heir to his father; for it is not only unnecessary, but improper, for a creditor to serve heir to his debtor, in order to make his payment effectual. Nor does the Lord Ordinary think that the cases of *Pagan* v. *Wilson's Trustees* (2) and *M'Leod* v. *Leslie* (3), cited for the Defender, are adverse authorities.

Upon a reclaiming note, the Second Division of the Court of Session recalled the Lord Ordinary's interlocutor, and decerned in favour of the Respondents for £300, with interest at 5 per cent. Hence the present appeal; in support of which *The Lord Advocate* and Mr. *A. C. Sellar* addressed the House, contending that the £10,000 paid to Colonel *Hagart* was not, in the sense of the 23rd section of the 5 & 6 Vict. c. 79, "a debt due and owing from the deceased, *Thomas Campbell Hagart*" (4).

The Law Peers, without calling on the Respondents' counsel

(1) 12th Nov. 1847, 10 Dun. 56.
(2) 18 Dun. 1096.
(3) 6 M'P. 445; Law Rep. 2 H. L., Sc. 44.
(4) The argument of the Appellant's counsel is commented on by Lord *Westbury*, and, as delivered in the Court below, is fully set out in the Report, 3rd Series of the Scotch Cases, vol. ix. p. 358.

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(Sir *Roundell Palmer*, Q.C., and Mr. *J. T. Anderson*) delivered the following opinions:—

LORD WESTBURY (1):—

My Lords, this case has been argued on the part of the Crown with great ingenuity and great subtilty, but I think your Lordships will agree with me that there is no substance whatever in the case contended for.

The first thing to be determined is, what in the eye of the law constitutes a debt. I believe that we have invariably been in the habit of considering that a debt is an obligation arising from contract, and if you like (though that may not be always needful) a contract for a consideration.

In the present case a settlement was made antecedently to the marriage of the late Mr. *Thomas Campbell Hagart* and Miss *Stewart*, the intended husband contracting and binding himself to make a certain provision for the wife, and then that a sum of money equivalent to the capital for raising the annuity given to the wife should be destined to the children of the marriage. The considerations for the obligations in that marriage settlement are first, the marriage itself, and then the provisions which are made by the friends of the intended wife. There can be no doubt, therefore, that for that engagement made by the husband there was good and valuable consideration in law. Now the engagement by the husband is to provide this sum of £10,000. The difficulty raised by the Crown is, that during the life of the husband he has the power of spending, or of selling, pledging, or alienating the property in any mode that he may think proper, provided that he does it for onerous cause.

It is said on the part of the Crown, that according to Scotch law the husband is fiar, and the parties who are to have the benefit of the contract after his death have during his life no more than a *spes successionis*, thus fastening upon the children the denomination of *hæredes*, so as to give to their title the quality of succession or descent, and not the quality of a claim by contract.

But my Lords, you are in the present case required to consider

(1) In the absence of the Lord Chancellor (Lord *Hatherley*), the Woolsack was occupied by Lord *Westbury* as Speaker.

what is the character of the ownership at the time when the contract came to be fulfilled at the death of the father; and then the right to the fulfilment is not a heritable right by virtue of a succession, that is a title given by law, but it is a right by the act and fact of the parties. Here are persons who at the death of the father claim not by virtue of inheritance, but by virtue of the distinct contract of the father contained in the marriage settlement. When we come to look at the language of the statute, we find that that language gives the right to a return in the event of debts paid by the executor out of the moveable estate that were due and owing by the deceased. I think the proper interpretation of that language is, that the return is given in respect of a debt of the deceased paid by the executor which was due and owing at the time of the payment.

Then I fall back upon the analysis of the case, and of the rules of law applicable to it, and we have only to ask, was this £10,000 a debt due and owing at the time when the executors paid it? The answer to that is clear. Without fatiguing your Lordships by going through the whole of the authorities, whether you look to the passage from *Erskine* (1), whether you look to the judgment pronounced by Lord *Fullerton* (2), or whether you look to the other decisions, particularly the case of *Wilson's Trustees* (3), which have been gone through again and again, there can be no possibility of doubt that all the Judges have concurred in the opinion that the children at the death of the father are not to be regarded as heirs and entitled by legal rules of succession, but are to be regarded as persons claiming by a contract, and if claiming by contract, therefore creditors of the deceased.

For these reasons, my Lords, I think there can be no possibility of doubt that this sum of £10,000 constituted a debt in the proper sense of the word; which debt having been paid out of the free personal estate, was a proper subject of deduction from the duty under the statute.

It appears that by reason of some mistake in the pleadings, or some misapprehension of the figures, the Inner House of the Court below gave the Respondents a return of £300; whereas they

(1) Inst. 3,8,38. (2) *Advocate-General* v. *Trotter*, 10 Dun. 56.
(3) *Pagan* v. *Wilson*, 18 Dun. 1096.

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ought not to have given them a return of more than £150. Under these circumstances your Lordships have had some difficulty how to deal with the costs of this appeal.

LORD COLONSAY:—

I entirely concur with what has fallen from my noble and learned friend; for I have not the least doubt that this sum of £10,000 must under the statute be regarded as a debt.

LORD CAIRNS:—

My Lords, I quite concur in the opinions which have been expressed on the merits by my noble and learned friends. On the subject of costs, the Lord Advocate having put the disposal of them in your Lordships' hands—the object of the appeal having been to obtain a decision from this House upon the principal question, which might arise in many other cases—I venture to think that it would be more satisfactory that the appeal should be dismissed in the usual way with costs.

LORD WESTBURY:—

In reality we shall be altering the interlocutor of the Court below to the extent of £150. I propose, therefore, to put the question to your Lordships in this form:—To declare that the Respondents are entitled to a return of £150 of surplus duty paid by them; to reverse as much of the interlocutor of the Second Division of the Court below as is inconsistent with that finding; and to direct that the costs of the Respondents in the present appeal be paid to them by the Appellant.

Ordered accordingly.

Agent for the Appellant: *W. H. Melvill.*
Agents for the Respondents: *Loch & Maclaurin.*

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et è contra.

A Father's Power of Appointment under his Marriage Settlement.

Where a father was, by his marriage settlement, empowered to divide at discretion the funds in which the children had an expectant interest:—

Held, that he could not deal or negotiate with them in executing the power.

Per THE LORD CHANCELLOR:—A parent in such a case purchasing the interests of the children, one of them being only eighteen years of age, is a transaction wholly inconsistent with that protection which the law of every civilised country affords to children; and would not be permitted without the fullest evidence of an intention authorizing it.

Held, reversing the decree below, that releases or discharges granted by the children to the father, in consideration of money payments made by him, formed no bar to their subsequent claims under the settlement,—such releases or discharges notwithstanding.

A Power may be executed without any Express Reference to it.

Per LORD CHELMSFORD:—The donee of a power may execute it without referring to it, and without taking the slightest notice of it, provided the intention to execute the power really appears.

Appointments pro tanto.

The power may be exercised from time to time by several appointments, to suit convenience and promote advantage, as exigencies arise, or as expediency may suggest.

Per LORD WESTBURY:—Some of the learned Judges of the Court below seem to have thought that the power required an execution *uno flatu*, once for all. If that were so, no appointment to a child, though settled in life, could take place until all the other children, objects of the power, had attained maturity.

Special Judgment.

Per LORD WESTBURY:—I am desirous that we should dispose of this case, so as not to leave any door ajar that may be pushed open for further litigation (1).

BY ante-nuptial contract of marriage, dated the 26th of March, 1828, between *James Anstruther*, W.S., and Miss *Marian Anstruther*, daughter of Sir *John Anstruther*, of *Anstruther*, Bart., £4000, contributed by the intended husband, and all the property then

(1) See the elaborate judgment of the House, *infra*, p. 242.

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belonging to the intended wife or which she might acquire during the marriage, were settled upon them "in conjunct fee and life-rent, and on the children of the marriage in fee,"—the deed declaring that, in the event of there being two or more children, the father, or the mother if she survived him, should have power to divide and apportion among them the £4000; while with respect to the wife's property a similar power of distribution was conferred on the parents jointly or the survivor of them; and it was provided that, failing such division, the children should take share and share alike in full satisfaction of *legitim* (1).

At the date of the marriage Miss *Anstruther* had £8000, and she afterwards unexpectedly succeeded to upwards of £50,000 on the death of her nephew, Sir *John Anstruther*, Bart. The clause as to her property specially declared that "it should be in the power of the spouses jointly, and the survivor of them, at any time of their lives, or even on death-bed, to divide and proportion the same among the said children as they should think proper."

There were three children, all daughters, the sole issue of this marriage, namely, Mrs. *Smith Cuninghame*, Mrs. *Mercer*, and Miss *Lucy Anstruther*.

Mrs. *Smith Cuninghame's* marriage took place in 1847, when she was but eighteen years of age; her father and mother (Mr. and Mrs. *Anstruther*) being parties to the ante-nuptial contract, and paying £5000 upon trust for the benefit of Mr. and Mrs. *Smith Cunninghame* and their children; there being a declaration in the deed that Mrs. *Smith Cuninghame* accepted the £5000 not only in satisfaction of *legitim*, but also in satisfaction of all claims that might be open to her under her parents' marriage settlement of 1828.

In 1859 Mrs. *Anstruther* died, survived by her husband. In 1861 their second daughter, Mrs. *Mercer*, married Mr. *Mercer;* and on that occasion Mr. *Anstruther* paid the trustees £5000; the marriage contract containing a declaration by Mrs. *Mercer* similar to that of her sister (Mrs. *Smith Cuninghame*), that the said sum of £5000 was accepted by her in satisfaction not only of *legitim*, but also of all claims under the marriage settlement of 1828.

Having thus seen his two elder daughters disposed of in matri-

(1) See Lord *Chelmsford's* opinion, *infra*, where the clauses are fully set out.

mony, Mr. *Anstruther* selected to be his own second wife Miss *Anderson*, whom he married on the 11th of October, 1866, having previously, on the 8th of that month, executed a trust disposition and settlement, the first purpose of which was, "to pay over or invest £20,000 for the sole use and benefit of his youngest daughter *Lucy;* declaring that the amount should be in full satisfaction of *legitim*, and of all claims under the settlement of 1828. This deed was signed by Miss *Lucy* in token of her acquiescence. The second purpose of the deed was expressed by a direction to the trustees, "to hold and invest £30,000" for the benefit of Mr. *Anstruther's* second wife, to pay her the interest thereof for her life if she should survive him, and after her death for the benefit of the children "to be procreated of the intended marriage," whom failing, to the husband's own nearest heirs and assignees.

Seven months after his second marriage Mr. *Anstruther* died, survived by his second wife. There has been no issue of their marriage.

On the 31st of December, 1867, Mr. and Mrs. *Smith Cuninghame* commenced the action out of which the present appeal arose against the widow, Mrs. *Anstruther*, and against Miss *Lucy Anstruther*, and also against the deceased Mr. *Anstruther's* trustees, requiring them to separate his funds from those of his first wife; calling also for a declarator that there had been no proper apportionment of the mother's estate or of the £4000; and insisting that the Pursuers were entitled to one-third of the provisions contained in the marriage settlement of 1828, giving credit for the £5000 already received.

It was decided by the Court of Session, First Division (*diss.* Lords *Neaves, Ardmillan*, and *Kinloch*), that all claim on the part of Mr. and Mrs. *Smith Cuninghame* under the marriage settlement of 1828 was excluded by the discharge or release contained in their own marriage settlement of 1847. The Court below, therefore, on the 11th of July, 1870 (1), assoilzied the Defenders from the conclusions of the summons, and found the Pursuers liable in costs (2).

(1) This judgment is represented in the 3rd Series, vol. viii. p. 1049, as having been pronounced on the 10th of July, 1870.

(2) See a full report of the case, 3rd Series, vol. viii. p. 1013; see also 3rd Series, vol. vii. p. 689.

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Mrs. *Mercer* with her husband sued for a third share of the funds provided by the settlement of 1828, giving credit for the £5000 already received.

On the 6th of March, 1871, the Court of Session decided against her as to the £4000 which came from her father; but decided in her favour as to the funds which came from her mother; the Court holding that Mrs. *Mercer's* case differed from that of Mrs. *Smith Cuninghame*, inasmuch as at the date of Mrs. *Mercer's* marriage the property had become vested in herself and her sister Miss *Lucy* (1). This was ruled by seven Judges, Lord *Deas* dissenting.

Against this judgment of the 11th of July, 1870, Mr. and Mrs. *Smith Cuninghame* appealed to the House, having for their counsel The *Solicitor-General* (2), and The *Dean of Faculty* (3).

Mrs. *Anstruther* and Miss *Lucy* put in their answer and also their cross-appeal, being represented at the Bar by The *Lord Advocate* (4) and Sir *Roundell Palmer*, Q.C.

The following opinions were delivered by the Law Peers:

THE LORD CHANCELLOR (5):—

My Lords, the question in this case is as to the legal effect to be given to the original marriage settlement of 1828,—to the two settlements executed on the marriages of Mrs. *Cuninghame* and Mrs. *Mercer* respectively,—and to the £20,000 made over to Miss *Lucy Anstruther*, for which she gave her discharge. The ultimate conclusion come to in Mrs. *Cuninghame's* case by the majority of the learned Judges below was, that the £5000 provided in her settlement, coupled with the release or discharge which she gave, operated as a complete extinguishment of her rights under the marriage settlement of 1828, and, therefore, of course, the consequence was an absolute failure of her action.

In *Scotland*, as here, when there is a power of apportionment of

(1) 3rd Series, vol. ix. p. 618.

(2) Sir *George Jessel*, Q.C.

(3) Mr. *Gordon*, Q.C. The Dean of Faculty doubted whether he ought not to lead the English Solicitor-General as he does the Scotch. But Lord *Westbury* cleared the difficulty by mentioning, that when His Lordship held the office of English Solicitor-General, it was determined that he should precede the Dean of Faculty. As to other similar cases, see *Macqueen's* Treatise on the House of Lords p. 337.

(4) Mr. *Young*, Q.C.

(5) Lord *Hatherley*.

this description existing in the parent he need not exercise it over the whole fund at one time; he may apportion it at intervals as the exigencies of his family require. The very object of such a power is to provide for such exigencies as they occur.

One argument which was pressed upon us for a different construction was, that the interest being a *spes successionis*, contingent during the lifetime of both the father and the mother, it might have failed in both of the funds had Mrs. *Cuninghame* predeceased the distribution and the period of her acquiring a complete and absolute interest in it; and therefore it was contended that the payment of the £5000 on the part of the father might be regarded (as some of the learned Judges, who were, in fact, the majority, decided) as a purchase by the father of the absolute right to all the interest of the child in the fund, and not as an apportionment of the fund itself. Now it appears to me that there are two reasons very strongly weighing against such a conclusion. In the first place the very notion of a parent bargaining with his child, in the language used by the learned Judges in *Scotland* entering into a transaction with his child for the purpose of purchasing her share in this species of expectancy, would be inconsistent with the law which has prevailed, I apprehend, in every country as to the protection of a child's interest—such a protection as makes it very difficult indeed for a parent under any circumstances to deal with a child; and certainly does not render it possible for him to do so without the child being fully informed of all the rights vested in such child. Therefore one would hesitate at any time to give to an instrument the construction of a bargain on the part of the parent in respect of an expectant interest on the part of his child.

Now here the child was not of full age. She was only eighteen, and she had to look to the parent, and to that parent only, for protection. Some of the learned Judges say that the intended spouse might have afforded her sufficient protection. They seem to think that that actually was the case, and that she was so protected. But, I think, according to any system of law that can be administered in any civilized country, it could not be permitted that a parent, without the fullest evidence of such being the intention, and the circumstances of the case warranting the intention and

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warranting the transaction, should become the purchaser of an unascertained interest in the child, an interest which could never be ascertained if the child died in the mother's lifetime, for a sum of money paid down, when the child's necessities required it, at the period of her marriage.

But I think there is abundant evidence to shew that the parties did not intend anything of the kind. In the first place the father and mother joined. If it was an interest to be acquired by the father, why did the mother join at all? In the next place, there is no previous recital of the settlement until we come to the discharge, and when we come to the discharge we find it to be an express discharge of all rights, and "all claims whatsoever, by or through the death of her said father or mother, or by the contract of marriage entered into between her said father and mother, and as the share or division hereby allotted to her of her said father and mother's property settled by the said contract."

Now it seems to me that there is quite plain and sufficient reference to the instrument and to the object and intent of the parties in the very form there used, and though it is quite true that it goes on to give a general release of her father's property under any circumstances whatever, yet even that is not inconsistent with the original settlement, because in the original settlement whatever portions the children were to take under the settlement of 1828 are there expressed to be in discharge of whatever share they might be entitled to of the parent's property, either by way of *legitim*, portion natural, or otherwise. So that it is only repeating the effect intended to be given to the original settlement and to the taking under that settlement.

The argument was, that it operated as an appointment to her of the £5000, and a discharge by her of all further interest in the existing fund, and that thereupon there was an actual handing over of the residue of the fund to the other two children.

I do not think that the instrument bears at all that construction, and it is a construction which one would not place upon it unless some very clear words to that effect occurred. For observe what might happen, and what, in fact, really did happen. On the next daughter marrying Mr. *Anstruther* does the same thing; he gives £5000 in the same form, and with the same discharge, and

there is very little doubt that if *Lucy* had married the form would have been exactly the same in her case, or at least it might have been so, so that he might have made three appointments of £5000 each. And having thus provided £15,000 out of the £60,000, he might have said the fund will now go back to the parties who provided it; so that the provisions originally contemplated would never have taken effect. But that would be an entire contradiction of the whole scope and frame of the original settlement, which was that the children were to take the whole, except where it was disposed of for onerous consideration.

It appears to me that this dealing with this sum of £5000 could only take effect as an apportionment *pro tanto* of the fund, leaving the rest of the fund to be apportioned. It was said even by those who opposed Mrs. *Cuninghame's* claim that they could not put their argument so high as to say that the parent had no right to increase her portion if he thought fit.

It was conceded, as regarded the father, that however he might be himself protected by the discharge he was not himself prevented from making a further apportionment if he thought fit.

When we come to Mrs. *Mercer's* case the sole difference is this: The mother having died, that interest which had been previously a *spes successionis* became absolute in Mrs. *Mercer* as regards the mother's property, subject only to the life-rent of the father.

The learned Judges were unanimous, I think, upon this case of Mrs. *Mercer* in setting aside the discharge in Mrs. *Mercer's* settlement.

LORD CHELMSFORD:—Lord *Deas* differed (1).

THE LORD CHANCELLOR:—But the other Judges, I think, all concurred, because they said that in Mrs. *Mercer's* case the discharge was made in ignorance of her position, that there was ignorance of the true state of the case as regarded her, namely that she would be placed in a much more favourable position than that of Mrs. *Cuninghame* by the circumstance of her mother's death and her having acquired a positive interest in this fund with which she was parting to so large an extent.

(1) 3rd Series, vol. viii. p. 1028.

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I apprehend that what has happened is this: An apportionment was made, first of £5000, part of the fund, to Mrs. *Cuninghame*, and her discharge has not prevented her having any other part that may be unapportioned. And Mrs. *Mercer* is placed in the same position. So that the two sums of £5000 having been taken out of the fund, it now remains to be seen what is to be done with the rest of it.

Then there is the dealing with *Lucy*, which is subject to the same remarks, namely, that there is an express recital that it is intended to operate by way of apportionment of the fund, and there is a discharge by *Lucy*, as in the other deeds. Therefore, it appears to me that the proper conclusion to come to is, that the £20,000 made over to her must be taken as an apportionment of the fund *pro tanto*. So that the sum of £30,000 out of the whole fund has been apportioned. It is said that the £30,000 exhausts the whole fund. We have every reason to suppose that it does not; but that must be a subject of inquiry, and the surplus, when ascertained, will have to be divided among these three ladies in equal proportions. I think that that in substance really reaches the whole of the case we have before us. It may be reduced to these simple propositions:—the first being that the children, in the event of the fund not being alienated for onerous cause already, had the right which has now accrued in the two funds, that of the father and that of the mother; secondly, the sum paid over to the first child, and accepted by her as her allotted portion, does not operate to bar and sweep her out of the whole benefit to be derived from the settlement, but only operates *pro tanto* as far as the £5000 goes; and, thirdly, the sum allotted to Mrs. *Mercer* in effect amounts to a similar appointment of the £5000 apportioned to her. And therefore your Lordships will have to make a declaration that the settlements of Mrs. *Cuninghame* and Mrs. *Mercer* are respectively appointments or apportionments under the power contained in the settlement of 1828. But the alleged release contained in each of those settlements does not amount to or effect any bar to the right of participation in any portion of the property, subject to the power of apportionment which may not be apportioned under that power. And that the release given by the third child in the same way does not operate as barring her from

taking any share in the remaining fund, and that the gift made by the trust settlement of 1866 of £20,000 to the third daughter *Lucy* is also an appointment to *Lucy* under the power, which it was fully competent to the donee to make, and then to order that if the two sums of £5000 and £20,000 do not in the aggregate amount to the whole of the funds brought into the two settlements, the balance of those funds is unappointed property, and is distributable under the trusts of the settlement of 1828 among the three children in equal shares; and that there must be an inquiry in order to ascertain of what those funds consist.

I ought to add that the Lord Chancellor of *Ireland* (1), who was present at the hearing of this case, concurs in the opinion which I have expressed, that the sums advanced to Mrs. *Cuninghame* and Mrs. *Mercer* were in effect appointments, and that they were not debarred from sharing in the fund which might remain unappointed and unappropriated. I am not, of course, able to say that he has known absolutely all that I have now stated, but he assents to my conclusions.

LORD CHELMSFORD:—

My Lords, the questions upon this appeal may be conveniently considered under the following heads:—

(1.) What is the nature of the right or interest which the children of Mr. and Mrs. *Anstruther* took under their parents' marriage contract?

(2.) Was the power of apportionment amongst their children contained in that marriage contract duly exercised by the obligation which the parents jointly took upon themselves in Mrs. *Cuninghame's* marriage contract, and Mr. *Anstruther* alone in Mrs. *Mercer's* marriage contract, to pay £5000 to trustees in trust for them and their children respectively, and by the acceptance by each of them of that sum in satisfaction of all claims which they had under the marriage contract of their parents?

(3.) Is there any ground for the reduction of the clause of discharge in Mrs. *Cuninghame's* and Mrs. *Mercer's* marriage contract, or either of them?

(4.) Assuming that the sums of £5000 paid to trustees for Mrs.

(1) Lord *O'Hagan*.

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Cuninghame and Mrs. *Mercer* on their respective marriages were proper exercises of the power of apportionment, and that the £20,000 given to *Lucy Anstruther* by her father upon his second marriage was also a good apportionment of that sum to her, and that these several sums did not exhaust the fund over which the power existed, how is the unappropriated fund remaining after the apportionments to be dealt with?

The nature of the right and interest of the children under the marriage contract of Mr. and Mrs. *Anstruther* seems to me to admit of little dispute. In each case of the property brought into settlement the fee was in the party from whom it proceeded, subject respectively to a life-rent in the other surviving; and the children had a succession which has been indifferently called a *spes successionis* and a protected interest; but whatever its proper name, it was a contingent right, which could have been defeated by a disposition for onerous causes, but not by a gratuitous alienation.

Upon the death of both their parents the children would have been entitled equally to the whole of the property, whether derived from their father or their mother, unless the power of apportionment amongst them contained in the marriage contract were duly exercised. That power, as to the father's £4000, is reserved to him to divide and proportion as he should think proper in favour of the children, and the mother surviving him was to have the same power; and as to the property provided by the mother, the power to divide and proportion it among the children was given to the parents during their joint lives, and afterwards to the survivor; and in both cases, failing any division, the provisions were to be divided among the children equally, share and share alike.

The next question, therefore, to be considered is, whether this power of apportionment amongst the children was duly exercised by the obligation to pay £5000 to trustees under Mrs. *Cuninghame's* and Mrs. *Mercer's* marriage contracts respectively, and their acceptance of those sums in satisfaction of all their claims under the marriage contract of their parents. There is no difference in the cases of these two children, except that at the time of Mrs. *Mercer's* marriage her mother was dead, and the obligation to pay the £5000 was undertaken by the father surviving. The clause of

discharge of their claims is in the same terms, *mutatis mutandis*, in the marriage contracts of each of the daughters.

Taking Mrs. *Cuninghame's* as the example, it runs thus:—

> And which said sum of £5000 is hereby declared to be, and the said *Maria Anstruther* hereby accepts of the same in full satisfaction of all *legitim*, portion-natural, or bairns' part of gear, and of all claims whatsoever which she (the said *Maria Anstruther*) has in any manner of way by or through the death of her said father or mother, or by the contract of marriage entered into between her said father and mother, dated 24th and 26th days of March, 1828, and as the share or division hereby allotted to her of her said father and mother's property settled by said contract, all which claims are hereby settled accordingly.

It was argued on the part of the Appellants that this could not have been intended as an execution of the power of apportionment, because there was no reference to the power, and because of the release, not only of the daughter's claim under the marriage contract of her parents, but also of her *legitim*, portion-natural, and bairns' part of gear; but that it was a transaction between the father and daughter, by which he, paying the £5000, not out of the trust funds, but from his own moneys, purchased the release of his daughter's claims for his own benefit; and that this opened to the Appellants the grounds of reduction of the clause of discharge upon which they insisted.

It appears to me that the obligation to pay the £5000 was intended to be, and was understood by all parties to be, an execution of the power of apportionment. Little reliance can be placed upon the circumstance that the clause contains no express reference to the power. As Lord *St. Leonards* says in his book on Powers (1), a donee of a power may execute it without referring to it, or taking the slightest notice of it, provided that the intention to execute it appears. And the reason of this is given in *Scrope's Case* (2), to which he refers, "*quia non refert an quis intentionem suam declaret verbis, an rebus ipsis, vel factis.*"

It appears clearly that the power must have been in the contemplation of the parties, from the words of acceptance of the £5000 by Mrs. *Cuninghame* in satisfaction (*inter alia*) of the share or division thereby allotted to her of her said father and mother's property settled by the marriage contract. It seems difficult to put any other construction upon these words than

(1) 8th Ed. p. 289. (2) 10 Co. Rep. 511.

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that of an acknowledgment that the £5000 was the share or division which Mr. and Mrs. *Anstruther* had the power to allot by their marriage contract. The acceptance of this sum, not only as the allotted share, but also in satisfaction of the *legitim*, portion-natural, or bairns' part of gear, which is used as an argument against its being an exercise of the power, strengthens my opinion that it must have been so intended. For the creation or reservation of the power in Mr. and Mrs. *Anstruther's* marriage contract is immediately followed by the words:

> which provisions conceived in favour of the child or children of the said marriage shall be in full satisfaction to them of all bairns' part of gear, *legitim*, portion-natural, executry, and everything else that they should ask or claim by and through the decease of the said *James Anstruther*, their father, except what he may think fit to bestow of his own good will only.

The satisfaction of these rights and interests would have followed upon the due execution of the power; and therefore it was unnecessary that it should have been expressly mentioned; but having been so, it shews that the clause must have been framed with direct reference to the power, and it leaves no doubt in my mind that it was intended to be an exercise of it.

An objection was made to the execution of the power, that the appointment of the £5000 to the daughters respectively was not confined to them, but made to others who were not objects of the power. This is answered by the case of *White* v. *St. Barbe* (1), in which it was decided that under a power to appoint among children interests may be given to grandchildren by way of settlement, with the concurrence of their mother (an object of the power) and her husband.

Having shewn that the £5000 given to the daughters upon their respective marriages was in exercise of the power of apportionment, and not a transaction with their parents, the next proposed question as to the reduction of the clauses of discharge in their marriage contracts, and all the evidence given as to their ignorance of their rights at the time of their acceptance of the £5,000 in satisfaction of their claims, falls to the ground. Because if a parent has a power of appointing a fund amongst children in such proportions as he may think proper, he may exercise that

(1) 1 V. & B. 339.

power at his own will and pleasure; and whether the child who has a share allotted is a minor or of full age, or whether he knows or is ignorant of the extent to which he might eventually become entitled in succession, or whether he expressly accepts or not the provision which is made for him, is wholly immaterial, as he can by no possibility control the parent in his discretion to distribute the fund amongst the children as he thinks proper.

Mrs. *Mercer's* case differs in no respect in the character of the provision made for her upon her marriage from that of Mrs. *Cuninghame.* Both were in exercise of the power of apportionment or neither. Mrs. *Mercer's* release of her claims could only be reduced upon the ground of its being a transaction with her father in ignorance of her rights in the succession to her mother's property; and if it were of that character, the clause in Mrs. *Cuninghame's* marriage contract is precisely similar. I cannot understand if, in Mrs. *Mercer's* case, it was a transaction which ought to be reduced, why the same conclusion was not adopted in favour of Mrs. *Cuninghame.* The Lord President draws this distinction between the two cases: "When Mrs. *Smith Cuninghame* was married in 1847" (he says) "she had nothing but a contingent claim against either her father or mother under their marriage contract, and she was receiving a present consideration in money for a discharge of that contingent claim. But when Mrs. *Mercer* was married in 1861 she had much more than a contingent claim; she had a joint fee along with her sister *Lucy* in the whole estate of which her father was life-renter." But with great respect the question in the case of both the daughters was not as to the nature of their rights, but as to their knowledge or ignorance of them; and in this view it seems to be immaterial whether the interests with which they were respectively dealing were contingent or vested. If they are to be considered as transactions which may be reduced on the ground of ignorance of facts which disabled the daughters from exercising a right judgment whether they should accept the £5000 in satisfaction of their respective claims, the case of Mrs. *Cuninghame* seems to be stronger in favour of reduction than that of Mrs. *Mercer,* as she was a minor, and her natural guardian, her father, does not appear to have afforded her the protection which she was entitled to expect from him. I could

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not avoid making these remarks upon the interlocutors of the Court of Session reducing the clause of discharge in Mrs. *Mercer's* marriage contract, and refusing to do so with respect to a similar clause in the marriage contract of Mrs. *Cuninghame*, although, as I have already shewn, these clauses being in both cases introduced into the contracts in the exercise of the power of apportionment contained in Mr. and Mrs. *Anstruther's* marriage contract, reduction of them is out of the question.

There only remains to consider what is to be done with the trust fund which, after all the allotments made in exercise of the powers of apportionment, is left unappropriated. I do not think that by these allotments the parents put it out of their power to increase the provision made for the daughters; nor was the joint power in Mr. and Mrs. *Anstruther* so exhausted by their exercise of it in Mrs. *Cuninghame's* favour, as to render it incompetent to Mr. *Anstruther* surviving, to make an addition to what had been before given to her.

Out of the unappropriated residue of the fund a sum of £20,000 was given to trustees by Mr. *Anstruther* for his daughter *Lucy* upon the occasion of his second marriage. There was a doubt suggested in argument whether this ought to be regarded as an appointment of the fund over which the power existed, or was not rather a bargain with *Lucy* out of Mr. *Anstruther's* own property. He certainly entertained the idea that after the death of his first wife he had the absolute fee in her property. And the trust disposition and settlement upon his second marriage with Miss *Anderson* proceeds upon this supposition. He thereby assigns, dispones, conveys, and makes over to trustees his whole means and estate, heritable and moveable, real and personal, in trust after payment of his just and lawful debts, death-bed and funeral charges, and the expenses of carrying the trust into execution, to pay over or invest the sum of £20,000 for the sole use and behoof of *Lucy Anstruther* and her heirs and assignees. And his trustees are to hold and invest the sum of £30,000 for payment to his promised spouse of the interest during her lifetime, and after her death the principal to the children of the marriage. The whole of the settlement has more the appearance of a disposition of his own property than of the exercise of a power by

which his authority was limited. But as in the allotment of the shares of the two other daughters the provision for *Lucy* is declared to be in full satisfaction of all claims she may have for bairns' part of gear, *legitim*, portion-natural, or through the marriage contract between her father and mother, and *Lucy* in token of accepting the provisions in full of all such claims subscribes the settlement, I think that if it had been to *Lucy's* interest to reject this provision as not being an exercise of the power of apportionment in her favour, it would not have been competent to her to do so; nor can her sisters successfully contend that there has been no due exercise of the power to the extent of this £20,000. But the £30,000 given to the second wife could only be a valid disposition if Mr. *Anstruther* were fiar of the fund remaining unapportioned amongst the children of his first marriage, because it would then be, as the Lord Ordinary said, "subject to his disposal for onerous causes or just and rational consideration." But he having only a power to divide and proportion the fund amongst the children of the first marriage, the disposition to the second wife was clearly void, as she was not an object of the power. The result is, that the whole remaining fund, beyond the two sums of £5000 to Mrs. *Cuninghame* and Mrs. *Mercer*, and the £20,000 to *Lucy Anstruther*, comes to be distributed equally amongst the three sisters, share and share alike, according to the provisions of the marriage contract of Mr. and Mrs. *Anstruther*.

I agree with my noble and learned friend in the judgment which he has proposed to your Lordships.

LORD WESTBURY:—

My Lords, it is matter of regret to observe the uncertainty and variety of opinions upon what in *England* would be deemed a very simple case; where, however, our Courts would not proceed upon any grounds that are not common to the jurisprudence of *Scotland* in this matter.

I must advert to the notion that seems to have been entertained by some of the learned Judges of the Court below, that the language of this power required an execution *uno flatu*—once for all (1).

(1) See the opinions, 3rd Series, vol. viii. p. 1017.

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Some of them appear to have imagined that the language required an entire apportionment, and that it did not admit of appointments from time to time; which would be to put an interpretation on the words utterly at variance with the objects of the power, and utterly subversive of any useful application to be made of the power. No appointment could be made to a child settled in life or married, until all the other children had also become of such an age that their future destination could be ascertained and fixed. It is quite clear that the reason of the thing demands that the power given to the parents—in one instance to the father, in the other instance to both parents—to apportion at any time must be interpreted so as to warrant the appointment being made from time to time; and so, in truth, it appears to have been conceded at the Bar, because it was admitted that after the appointment to Mrs. *Cuninghame* and to Mrs. *Mercer* further appointments might have been made.

The next difficulty felt by the learned Judges in the Court below was on the words which have been denominated a "release" in the appointment to Mrs. *Cuninghame* and in the settlement for Mrs. *Mercer*, and various effects have been ascribed to these alleged words of release. Some learned Judges appear to have imagined that they operated as an assignment by contract to the father, or the donee of the power, of the whole extent of the portion which in an equal division of the entire fund might have been attributed to the objects of the power. Now, it is quite clear that that would destroy the very foundation upon which the powers given to the parents are rested. If it were possible to admit any contract between a father and a child as the reason for the exercise of the power, fraudulent transactions might be introduced, destructive of the interests of the child, and giving to the father that which he ought not to obtain. In accordance with the settled principles of Equity, it is impossible to hold that the father could gain any benefit to himself in the residue of the trust fund by having made an appointment of one part of it as to one of the children.

But some of the Judges imagine that the release might enure to the benefit of the two other sisters who were the objects of the power. Sometimes it was imagined that the release of Mrs. *Mercer's*

settlement might enure to the remaining sister. It is utterly impossible to find in either settlement any contract to that effect, or that the words should receive that interpretation, even if it were possible that such a transaction should have force given to it consistently with an honest exercise of the power. The truth is, that what are called the words of release amount to no more than this,—that the sum appointed to the child shall be taken as part of the settlement provision in which the child under the trust settlement had an interest. The whole case, therefore, assumes a very simple aspect as soon as the ordinary suggestions of common sense are applied to the interpretation and to the effect which, having regard to the intention of the power, ought to be attributed to it.

Now, the relative position of the children is perfectly clear. They stand on an equality with regard to the undistributed and unappointed parts of the fund. The father's right to determine the quantity is thereby acknowledged, so far as he has exercised that right. He thought proper to appoint £5000 to Mrs. *Cuninghame*, reserving, of course, the right of making a further apportionment. In like manner he has given £5000 to Mrs. *Mercer*, and in like manner he has given to Miss *Lucy* £20,000. But, supposing these sums not to exhaust the fund, the residue falls under the disposition contained in the settlement, and will be divisible equally among the three sisters.

I consider that the settlements on Mrs. *Cuninghame* and Mrs. *Mercer* are respectively appointments under the power contained in the settlement of 1828. I prefer the word "appointment" because the word "apportionment" seems to imply a dealing with the entirety of the fund. But the alleged release contained in each of the settlements does not amount to, or effect, any bar to the right of participation in any portion of the property, subject to the power of appointment, which may not have been appointed under the power. Neither does the release give to the third child, or operate by implication as an appointment to the third child, of the residue of the funds which were subject to or comprised within the power. The gift made by the trust settlement of 1866 (that is, Mr. *Anstruther's* will) of £20,000 to the third child, *Lucy*, is, in my opinion, an appointment to *Lucy* under the power, and which it

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was fully competent to the donee of the power to make. But if (as in this case) the two sums of £5000 and the £20,000 do not together equal the aggregate amount of the funds brought in by Mr. *Anstruther* under the settlement of 1828, and of the funds of Mrs. *Marian Anstruther*, also brought into that settlement, the balance of these funds (after deducting the three sums amounting in all to £30,000) is unappointed property, and is distributable under the trusts of the settlement of 1828 among the three children in equal shares; for I do not think the children are bound in this division of the surplus to bring into hotchpot the sums appointed to them respectively. The right of the children to the provisions brought in by Mr. and Mrs. *Anstruther* under the settlement of 1828 was not defeated by the provisions for the second Mrs. *Anstruther* under the settlement of 1866. On the death of Mrs. *Marian Anstruther*, her surviving husband became fiar in trust of all the property brought in by *Marian*, and could not defeat the interests of the children.

Therefore the interlocutor of the 11th of July, 1870, was totally wrong. The judgment in Mrs. *Mercer's* case is wholly inconsistent with it, inasmuch as it finds that Mrs. *Mercer* was entitled to share with her sister Mrs. *Cuninghame* in the estate and effects of their mother so far as not settled and appropriated by their father and mother jointly, or by their father after their mother's death. It will be observed that my observations would give the surplus to the *three* sisters. The difference of the decision in Mrs. *Cuninghame's* case from that in Mrs. *Mercer's* case cannot be supported by any difference in the wording of the alleged releases in the two settlements, for they are identical. And it is evident that the question as to the fee of the settlement funds is wholly immaterial, it being admitted that the power of apportionment remained unaffected, and that, *subject to that power*, the effect of the settlement of 1828 was to give the whole of the settlement estate to the three children as substitutes to their parents in equal shares.

There is no question with any creditor or alienee for value of Mr. *Anstruther*.

I think it expedient that the order of the House shall embrace both appeals. Subject to any alteration that may hereafter be deemed advisable, I will read what I should propose as the form

of the judgment for the information of the counsel at the Bar:— [Here Lord *Westbury* gave the heads of the judgment which was afterwards adopted by the House.]

There is a point which I must submit to your Lordships' attention, and that is the question how the enormous amount of the costs which have been incurred in this unfortunate litigation are to be met. Now, considering how the decisions in this case have varied, the wanderings of the parties themselves may in some degree be excused, and I should, therefore, humbly submit to your Lordships that the costs of all the parties should be paid out of the free estate of Mr. *Anstruther*.

I am desirous that if possible we should dispose of this matter in such a way as not to leave any door ajar that may be pushed open in the Court below so as to admit of further litigation. Whether we can do that or not may be very problematical. I understand that your Lordships wish to reserve to yourselves the power of considering the exact form of your order. I am not at all sure that the words I have now read comprehend the whole of the matter, but in case any alteration therein should be desirable, perhaps your Lordships will approve of the form of account being given, before the order is made, to the counsel on either side, not to afford an opportunity for any further argument at the Bar, but that they may be at liberty to send in such amendments in the form of account as they may think desirable.

THE LORD CHANCELLOR:—

My Lords, with reference to the last remark that my noble and learned friend has made regarding the expense of this litigation, I should go so far with him as to think that ultimately Mr. *Anstruther's* property, he being really the cause of the mode in which these instruments were executed, and therefore the source of the vexation and intricacy that have subsequently occurred in solving the various questions which have arisen, might be charged with that expense; but one does not know how the course of events may turn out with reference to the proportion of property in the several estates. As between the three sisters I apprehend that all costs should come equally, if they are obliged to have recourse to their own funds, out of that free fund which is left after the appor-

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tionment, but having recourse to the father's estate, in the event of that estate being sufficient to answer them, in order to recoup the diminution of the fund. The father's estate therefore will pay the costs in the first instance if sufficient to do so. If not, the costs will necessarily have to come out of the fund to be divided.

LORD WESTBURY:—I have not the least objection to that.

THE LORD CHANCELLOR:—Then the questions will be, that the interlocutors complained of, so far as they are inconsistent with the declaration afterwards to be contained in your Lordships' order, be reversed. We will postpone the exact form of the declaration, though I believe we agree in substance with the proposal of the noble and learned Lord. And as to the expenses, that they be borne in the manner prescribed in the form of order as it will be finally drawn up.

The final judgment of the House was as follows:—

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Ordered and Adjudged, That the interlocutor of the 11th of July, 1870, be reversed; and that such parts of the interlocutors of the 18th of March, 1869, and of the 6th of March, 1871, as are inconsistent or at variance with the findings and declarations and order hereinafter expressed, be also reversed; and this House doth Find and Declare, That the marriage settlement of Mrs. *Cuninghame*, and the marriage settlement of Mrs. *Mercer*, were respectively valid appointments of the two sums of £5000 in exercise of the power contained in the settlement of 1828; but that such appointments did not exclude Mrs. *Cuninghame* or Mrs. *Mercer* from participating in so much of the funds or property comprised in the said deed of 1828 as have not been appointed under the powers therein contained. And this House doth further Find and Declare, That the trust disposition and setttlement of Mr. *Anstruther* of the 8th of October, 1866, was a good appointment under the power in the said deed of 1828 to *Lucy Anstruther* of the sum of £20,000, but that she is not thereby debarred from participating equally with Mrs. *Cuninghame* and Mrs. *Mercer* in the residue of the settlement funds of 1828 (if any) remaining unappointed or unexhausted by the said three appointments. And this House doth further Find and Declare, That according to the true construction of the powers contained in the said settlement of 1828 the same admitted of being validly exercised from time to time by several appointments. And this House doth further Find and Declare, That the estate of Mr. *Anstruther* is entitled to have credit in the account hereinafter directed for the two sums of £5000 paid by him to the trustees of Mrs. *Cuninghame's* and Mrs. *Mercer's* settlements and for any sum received by Miss *Lucy Anstruther* on account of the sum of £20,000. And this House doth further Declare and Direct, That a reference be

made to such person as the Court of Session shall appoint under the remit hereby made to take the following accounts: 1. An account of all the funds, moneys, and property that were comprised in or became subject to the trusts or dispositions expressed or made in and by the said settlement of 1828, and of the manner in which the funds, moneys, and property at the death of the said *James Anstruther*, and to ascertain and state what, if anything, was at the time of his decease due from the said *James Anstruther* (subject as aforesaid) in respect of any trust property or principal trust moneys received by him and applied to his own use, and to ascertain and state the balance due from the estate of the said *James Anstruther* to the trust estate under the said settlement of 1828; and, if necessary, to take an account of all the estate of the said *James Anstruther* not comprised in or subject to the trusts of the said settlement of 1828 and of the receipts and payments of his trustees or representatives in respect of such estate (not subject as aforesaid,) and to ascertain what estate of the said *James Anstruther* is applicable to the payment of the balance that may be found due from him to the trust estate under the said settlement of 1828 as aforesaid. And it is further Ordered, That the expenses of all parties in the Court of Session, being taxed under the direction of the said Court, and the costs of all parties in respect of this appeal, the amount thereof being certified by the Clerk of the Parliaments, be paid as follows, namely, the costs and expenses of the trustees of the said *James Anstruther* shall be paid out of the free estate of the said *James Anstruther;* and if any balance of the said free estate shall remain after such payment, the costs and expenses of the several other parties shall be paid out of the said balance, and if the same be deficient, then the last-mentioned costs and expenses, or any balance thereof, shall be paid out of the residue of the said settlement funds remaining unappointed or unexhausted as aforesaid. And it is also further Ordered, That the cause be remitted back to the Court of Session in *Scotland*, to do therein as shall be just, and consistent with these declarations, findings, and directions, and this judgment.

Agents for the Appellant: *Grahames & Wardlaw.*
Agents for the Respondent: *Loch & Maclaurin.*

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June 11. MRS. FORSTER . . . . . RESPONDENT.

Consensual Marriage by Declaration.

A written declaration of marriage *de præsenti* signed by both parties and delivered by the man to the woman, conclusively establishes the contract.

Proof of Signature to the Declaration.

Circumstances under which it was held that direct proof of the wife's signature to the declaration was unnecessary, she possessing the document, and suing upon the faith of it for a declarator of marriage.

Promise Subsequente Copula.

The declaration might be regarded as a promise which when followed but not preceded by *copula* constitutes marriage.

IN this case a youth of twenty married his mother's housemaid, three years older than himself; the courtship having been carried on in the kitchen, and the connubial relation only known to the coachman and the other servants of the family. The husband, when awoke to his error, treated and represented the whole affair as a jest. But the Court of Session, enforcing the Scotch law, decided that the marriage, though indiscreet and clandestine, was binding and irrevocable.

Upon a suit instituted by the wife (the above Respondent) praying a declarator of marriage, she relied chiefly on the following declaration written by the Appellant on the fly-leaf of his Bible, which he delivered to her:—

I, *James Ogilvie Tod Forster*, take thee, *Jessie Grigor*, to be my wedded wife from this day henceforth until death us do part, and thus do I plight thee my troth.

I, *Jessie Grigor*, take thee, *James Ogilvie Tod Forster*, to be my wedded husband from this day henceforth until death us do part, and thus do I plight thee my troth.

James Ogilvie Tod Forster.
September 2, 1865. *Jessie Grigor.*

The handwriting and the signature of the Appellant were clearly proved; but no positive evidence was given to shew that the Respondent's name was genuine, although it appeared to be so,

she having constantly kept and repeatedly exhibited the document, which she now produced as the main attestation of her marriage.

There was abundant proof of sexual intercourse; but that intercourse was averred by the Respondent to have been subsequent to the declaration, and consequently confirmatory of the marriage, it having, as she averred, taken place between them as husband and wife on the faith of their prior mutual promises and consent, which was followed in due time by the birth of a son.

The Appellant, on the other hand, repudiated the declaration, and denied the sexual intercourse.

The Lord Ordinary (1) gave judgment, finding that "*Jessie Grigor* and *James Ogilvy Tod Forster* were married persons—husband and wife of each other." His Lordship held that the evidence might be regarded in two ways, either as constituting *ipso facto* and *ipso jure* a valid and perfect marriage, or as amounting to a promise of marriage which, when followed by *copula,* leads to the same result, "there being no inconsistency in that mode of pleading." To this decision the First Division of the Court of Session unanimously assented and adhered (2); and thereupon Mr. *Forster* appealed to the House, having for his counsel at the Bar

Sir *Roundell Palmer,* Q.C., and Mr. *Chisholm Batten,* who urged, among other arguments, fully considered in the following opinions, that there was no proof of the Respondent's signature to the declaration, and that the case had been decided in the Appellant's absence, he having been in *America* at the time. They also insisted that the Court below ought to have received certain fresh evidence which he tendered, but which they refused to receive.

Mr. *Anderson,* Q.C., and Mr. *Shiress Will,* for the Respondent, were not called upon to address the House, the Law Peers at once delivering judgment as follows:—

THE LORD CHANCELLOR (3):—

My Lords, it appears that the Appellant chose to go abroad at the very time when this case was pending; and, as it is said, did not leave those whom he instructed to protect his interests suffi-

(1) Lord *Manor.* (2) See the 3rd Ser. of Scotch Cases, vol. vii. p. 797.
(3) Lord *Hatherley.*

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cient materials at their command adequately to defend him. It was only afterwards that an application was made to the Court on his behalf, to allow him to give further evidence, with reference especially to the plea which he has raised as to the handwriting. He denies that he wrote the instrument on which the question turns, or that it is a genuine document. Now, I think the case is beyond all doubt as to his being the author of the memorandum written in the Bible which, I also think it clear, beyond all doubt, he presented to the Respondent.

But, then, it is said, that her signature is not proved. Certainly, it is somewhat singular that no direct evidence was given of her signature, considering that she called witnesses who might have proved it; especially her mother. But it is proved that the Respondent shewed the document to *Helen Chisholm* "between August and September." That would be about the end of August or the beginning of September. *Helen Chisholm* says that it was shewn to her and read to her by her fellow servant, and it was therefore adopted in every respect as a genuine document; and the purpose for which it was shewn to her is obvious, because the Respondent at that time was following a not very delicate course of proceeding, even supposing this marriage to have taken place; for while habitually sleeping in the same room with the witness, she from time to time admitted the Appellant to her bedroom on occasions when the witness was in the room. There was, therefore, nothing more natural than that such conduct should require explanation, and that the Respondent should shew this document for the purpose. But I cannot help observing that when *Helen Chisholm* was there as a witness and had this document shewn to her, if there is any doubt about the genuineness of the signature one cannot understand why the counsel in cross-examination should not have asked a single question upon the subject. I do not think it is a sufficient answer to say that the burden was upon the Respondent to prove her own signature. In the first place I apprehend that the signature by the Appellant to that document, if genuine, is a plain distinct acknowledgment *per verba de præsenti* that he has taken the Respondent to be his wife; and it is by no means made clear to me by the cases which have been cited with respect to the law of

Scotland, that it would be necessary in that position of things for the woman who took that instrument, made as it is, to make out that she had herself signed the document so handed and delivered to her. If she took it and kept it by her, and shewed it to her fellow-servants, to whom she was interested in shewing it for the reason I have assigned, then I apprehend that even if the signature was not manually hers, but was acknowledged by her as hers by producing it to others, that is a clear and distinct recognition and acknowledgment of the contract entered into by virtue of the instrument by both parties. For I agree with the learned Judges in the Court below, that the instrument is most plainly and clearly expressed as an immediate contract *de præsenti*, and not a contract as to the future, and if it be a contract *de præsenti*, it would not be necessary for her to sign it at all if she admits the document, and it had been followed by the consequences of such a contract, which of itself would establish the validity of the contract *de facto*. But I think we are entitled to say that when it was alleged that she shewed the Bible and this writing, first to *Helen Chisholm* and afterwards to her mother (1), it was the duty of those who wished to shake the allegations as to the contract being a distinct engagement between herself and the Appellant to cross-examine the persons who alleged they had seen it, as to whether the signature was really genuine or not.

Now, what followed upon this document? I think it is perfectly plain that intercourse took place between the parties, although this gentleman, the Appellant, has denied it in his answer to the condescendence.

Then it is said that the question is not merely whether such a writing exists, but under what circumstances it was given. There

(1) The mother advised her daughter "to be married by a minister." And here Lord *Ardmillan* remarks that, "to any one acquainted with the habits and feelings of the respectable class of peasants in *Scotland*, this fact, that notwithstanding the exchange of the writings in question, the mother, or even the girl, wished a marriage by a minister, must appear to be quite natural as well as becoming, and not in the least inconsistent with the legal effect of the written matrimonial consent. Those who suppose that any form of irregular marriage is considered in *Scotland* to be as creditable, as becoming, or as satisfactory as marriage by a minister of the gospel, do not really know the habits or feelings of the people of *Scotland* on this subject."

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is no distinct evidence of his having become possessed of her person anterior to the date of this document. We should be taking an extremely unusual course, upon grounds of the most slender description, if we were now to allow the introduction of new evidence after this person had every opportunity of conducting the case in the ordinary manner. The only result will be that his appeal must be dismissed.

LORD COLONSAY:—

My Lords, I concur in the judgment that has been suggested by my noble and learned friend. The first point is, whether there ought not to be a further allowance of proof. I see no ground at all for complaint on that point. The record was made up in the usual manner, and the case went to proof. There was no hurry; there were two days of the examination of witnesses. The Judge then took it into consideration from the 21st of November to the 25th of January, and then pronounced his judgment. Neither at the time of leading the proof, nor at the conclusion, nor in the interval between the conclusion of the proof and the pronouncing of the judgment, was any complaint made of surprise, or any application made to be allowed to produce further evidence.

Then the case was appealed to the Inner House, and that must be done within a limited time after the judgment is pronounced; and it was not till the month of May following—and the cause was nearly at the top of the roll for hearing—that application was made to be allowed to produce further evidence. The Court was not moved by anything said then, and I have heard nothing to-day to lead me to think that any wrong was then done which your Lordships are called upon to correct.

In my humble opinion the evidence before us is conclusive against the Appellant. I think that the document which is produced here is sufficiently proved to be in the handwriting of the Defender. There are several witnesses who know his handwriting, and have spoken to that effect. It is difficult for any one comparing the document thus acknowledged with those proved writings of his which are produced to have any doubt upon the subject; and as far as the evidence of the experts may go (though I confess it is not a kind of evidence that I have any partiality for), it is at

least confirmatory of the other evidence. The Appellant denies that it is his writing; but I think it is sufficiently established that it is. That is not a favourable aspect of the matter for him. He also denies that other part of the case—which I think also equally established—as to the connection between the parties after the date of the document.

Then, looking at the document itself, the great plea that is urged against it is that the Respondent has not proved her own signature. Now I think, under the circumstances in which this document is presented to us, that is to be presumed to be her signature. I think, also, that the two signatures are not in the same handwriting. No one says that they are. And I cannot avoid coming to the conclusion that this document is a declaration made by both parties, being a *de præsenti* declaration of their marriage. That being so, it might not be necessary to go further; but that view of the document is evidently, to my mind, strengthened by the other features of the case. One observation that was made by Sir *Roundell Palmer* was, that it did not appear that this declaration of marriage was followed up by intercourse afterwards, but that it was something that occurred in the course of that intercourse, and was merely in the nature of a promise *de futuro*. But as I read the evidence it is not proved that anterior to the 2nd of September there were any circumstances from which we can infer sexual intercourse. There is nothing, in short, to interfere with the statement of the Respondent that the intercourse took place after the date of the instrument. I therefore think that the judgment of the Court below is right.

LORD CAIRNS:—

My Lords, I agree that this appeal ought to be dismissed (1).

Interlocutor affirmed and appeal dismissed.

Agent for the Appellant: *E. H. Barlee.*
Agents for the Respondent: *Holmes, Anton, Greig, & White.*

(1) Lord *Cairns* remarked, at the opening of the argument, that the delivery of the Bible by the Appellant to the Respondent, and her acceptance, retention, and exhibition of it, rendered, under the circumstances, a proof of her signature to the declaration superfluous.

1872
July 19.

COUSTON, THOMSON, & CO., Wine Merchants in Leith . . . . . } Appellants;

CHAPMAN, Auctioneer in Edinburgh . . Respondent.

Sale by Sample—Privileges and Obligations of the Purchaser.

10 C B 292-3

The purchaser of goods by sample ought to examine them without delay; and if he find that they are not conformable to the sample, he may reject them and rescind the contract,—giving immediate notice that he does so, and that the goods are at the risk and disposal of the vendor.

Should the vendor not acquiesce, the purchaser should place the goods in neutral custody, duly apprising the vendor.

The purchaser is not entitled to hold by the contract and ask for other goods instead of those to which he objects.

Where in such a case certain purchasers had omitted to rescind the contract, and neither returned nor offered to return the goods, they were held liable for the price.

Per Lord Chelmsford:—As I understand the law of *Scotland*, although the goods have been accepted by the purchaser, yet if he find that they do not correspond with the sample, he has an absolute right to return them. In *England*, if goods are sold by sample, and they are delivered, and accepted by the purchaser, he cannot return them; but if he has taken the delivery conditionally, he has a right to keep the goods for a sufficient time to enable him to give them a fair trial,—and if they are found not to correspond with the sample, he is then entitled to return them.

Per Lord Chelmsford:—In *England*, if a horse is sold with a warranty of soundness, and it turns out to be unsound, the purchaser cannot return the horse unless there is a stipulation that if the horse does not answer to the warranty the purchaser shall be at liberty to return it. But in *Scotland*, as I understand the law of that country, there would be an absolute right to return the horse upon the discovery of its unsoundness, without any specific stipulation to that effect.

On the 19th of March, 1870, several lots of wine were purchased by the Appellants from the Respondent at one of his public auctions in *Edinburgh*. The sale of each lot was by sample. The price of the whole was £699 16*s*. 5*d*. The delivery of the goods was completed by the 11th of April.

The Appellants had the wine examined. The result was unsatisfactory, especially as to lots 24 and 51. On the 31st of May they wrote to the Respondent, saying they "were agreeable to pay for the rest of the goods," but intimating, as to lots 24 and 51, that they would pay for them when supplied according to the sample; adding that they "considered themselves entitled to the

difference between the price at which they had purchased them and the price at which they could be bought in the market." The Respondent answered on the 1st of June that the Appellants' "proposition could not be entertained." On the 3rd of June the Appellants wrote by their agent, saying "they were anxious to have the matter settled," but doing nothing to attain that object. On the 8th of June the Respondent's agents replied that they were preparing a summons for payment of the price "of the wine purchased on the 19th of March." On the 9th of June the Appellants, by their agent, proposed a reference, but they still kept the wine and withheld the price. On the 13th of June the Respondent's agent sent by letter the threatened summons, which was acknowledged on the 14th of June as "served;" the Appellants' agent then writing that "his clients" (the Appellants) "were agreeable to pay for the whole of their purchases, with the exception of lots 24 and 51, which they were willing to return without any claim for deterioration or value." This communication put an end to the negotiations, and the Respondent's action against the Appellants came before the Lord Ordinary (1) who, on the 29th of November, 1870, decided as follows:

Finds (1) that the Defenders purchased from the Pursuer, at a public sale on the 19th of March, 1870, the various lots of wine mentioned in article first of the Pursuer's condescendence, and that at the various prices therein specified: Finds (2) that shortly after the sale, and about the end of March or beginning of April, the Defenders received delivery of the whole lots so purchased by them: Finds (3) that some time thereafter, and in April and May, 1870, the Defenders objected to lots Nos. 24 and 51 as being disconform to sample: Finds (4) that the Defenders did not expressly offer to return these lots, but the Pursuer intimated that he would not receive them unless the whole lots purchased by the Defenders were returned: Finds (5) that the Defenders have not returned, and have not placed in neutral custody, any of the disputed lots, or any part thereof, but have retained, and still retain, in their own possession, custody, and control the whole lots purchased by them: Finds, in point of law, that the Defenders are barred from now withholding payment of the price on the ground that the wines, or any of them, are of defective quality: Therefore decerns and ordains the Defenders to make payment to the Pursuer of the sum of £699 16*s.* 5*d.* sterling, with interest thereon and expenses.

His Lordship explained in a note that the specialty on which the Lord Ordinary has felt himself compelled to decide the whole case against the Defenders, is, that, notwithstanding the challenge and the dispute, the De-

(1) Lord *Gifford.*

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fenders have, from the time of delivery until now—a period of eight months, and more than seven months after the alleged bad quality was discovered—retained the whole wine in their possession and under their own control, and have failed to place it either in neutral custody, or to apply timeously for a warrant of sale. It is quite fixed that a purchaser who rejects goods as disconform to order has no right to retain them as a security for damages, or that other goods shall be sent. If he does so, though his objection to quality be well founded, he must pay the contract price.

Against this interlocutor the Appellants reclaimed to the First Division, who, on the 10th of March, 1871, found and decreed as follows: (1)

Find that no return or offer of return of the said wines, or any part of them, was made before the institution of the present action, and that the said wines have all along remained in the custody and under the control of the Defenders, and that they have at various times, and at their own hand, opened and used, for the purpose of trial and experiment, portions of the wines of which the Defenders refuse to pay the price, to the extent in all of four or five dozen bottles: Find, in point of law, that, in these circumstances, the Defenders are now barred from withholding payment of the price of lots 24 and 51, on the ground that these lots are disconform to sample, or not conformable to the contract of sale: Therefore decern against the Defenders in terms of the conclusions of the summons.

Under these circumstances the present appeal was presented to the House, and having been set down for argument,

Mr. *Manisty*, Q.C., and Mr. *Campbell Smith* appeared for the Appellants, and were very fully heard.

The *Lord Advocate* (2) and the *Solicitor-General* (3) were not called upon to address the House; their Lordships delivering the following opinions:

THE LORD CHANCELLOR (4):—

My Lords, it is clear in this case that the purchase of each lot was a distinct contract. The question is as to lots 24 and 51, and the contest of the Appellants is, that the sale having been by sample, these lots were not conformable to the sample. The sale took place on the 19th of March, and the delivery was to have been immediate, but did not take place until early in April. Sold as claret of fine quality and sufficiently high price, the Appellants

(1) 3rd Series, vol. ix. p. 675. Lord *Deas* dissented from the judgment upon the facts; but he did not dispute the general principles of law laid down by the other Judges.

(2) Mr. *Young*, Q.C.

(3) Sir *George Jessel*, Q.C.

(4) Lord *Hatherley*.

sent a sample of it to a Mr. *Cooper*, of *Reading*, who, upon examining it, returned it, stating that the wine was wholly unfit to be offered to customers. There was no offer by the Appellants to return the lots before the 14th of June, which was the day after the matter was brought into litigation, the proceedings having commenced on the 13th.

There is no doubt that the wine was delivered, and there is no doubt that it was not according to sample; but there is one matter which it was undoubtedly thrown upon the Appellants to prove, namely, the timeous rejection and return of the thing bought. The question is, whether that has been clearly made out and established to your Lordships' satisfaction. However unfortunate it may be for these gentlemen, I apprehend that the only conclusion to which we can properly come is that this was not done. These gentlemen had really only one thing to do, or rather one of two things to do, namely, either to take the lots and pay for them, trusting to what they might recover in a subsequent action; or to reject them at once, and notify to the vendor that they held them at his risk and disposition, and that they utterly abnegated all liability and all responsibility in respect of those wines. I say they might have done that on the 6th of May; but nothing whatever was done until the 13th of June, when the action had been brought.

I apprehend the Court would have been entitled to come to the conclusion that there had not been such a clear and distinct notification of the breaking off of the contract up to at least the 13th of June (whatever there may have been on the 14th of June) as would justify these gentlemen in retaining, as they did, the goods which had been sold to them without paying the price for them.

It was suggested in argument that in effect there was no contract between the parties as to the quality of the wine. A case was cited in which a person engaged, not to sell a definite thing *in esse*, but to supply certain quantities of yarn according to sample (1). He might supply the yarn from whencesoever he pleased; there might not be a single hank of it *in esse* at the time beyond the sample of it. He furnished some *jute* instead of flax. There the very contract was for flax, not for jute—a thing different *in rerum naturâ;* but here the contract is for certain specified wines sent

(1) *Jaffe* v. *Ritchie*, 23 Dunlop, 242.

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over by a certain firm, and lying in certain specified cellars. The parties were both of them acting *bonâ fide*. Both the vendor and the vendee thought that it was wine of the quality represented by the sample; both thought so up to the very moment of the communication from *Reading*. Those gentlemen found that when they received the goods the articles supplied were not what they conceived that they ought to be. They had it in their power either to accept them and pay for them, reserving all their rights, or to reject them and notify the rejection. It appears to me that they have not done either the one or the other, and the consequence is that they are now liable for the price.

I think, therefore, my Lords, that all that we can do is to affirm the interlocutors of the Court of Session and dismiss the appeal, with costs.

LORD CHELMSFORD:—

Reference has been made to the difference between the law of *England* and the law of *Scotland* as to the right of a purchaser to rescind a contract, and therefore I will say a few words upon that subject.

In *England*, if goods are sold by sample, and they are delivered and accepted by the purchaser, he cannot return them; but if he has not completely accepted them, that is, if he has taken the delivery conditionally, he has a right to keep the goods for a sufficient time to enable him to give them a fair trial, and if they are found not to correspond with the sample he is then entitled to return them.

As I understand the law of *Scotland*, although the goods have been accepted by the purchaser, yet if he find that they do not correspond with the sample, he has an absolute right to return them.

In *England*, if a horse is sold with a warranty of soundness and it turns out to be unsound, the purchaser cannot return the horse, unless there is a stipulation in the agreement that if the horse does not answer to the warranty the purchaser shall be at liberty to return it; but all that he can do is to offer to return the horse to the seller, and if the seller refuses to receive back the horse then the purchaser may sell the horse and recover the difference in price. In *Scotland*, as I understand the law of that country, there would be an absolute right to return the horse upon the discovery

of its unsoundness, without any stipulation to that effect in the agreement.

The Appellants here state that the wine was not conformable to contract; and that they rejected the lots and "timeously" offered to return them. I was rather astonished to hear it stated at the Bar, that upon these pleas in law it was incumbent upon the Respondent to shew that there had not been an offer to return the wines without delay; that is, that it was the incumbent duty of the Respondent to prove that which it would have been almost impossible for him to prove in this case, namely, a negative; that there had *not* been an offer to return. We were also warned, that if we decided otherwise we should change the law of *Scotland* in this respect. I do not think that the law of *Scotland* is so unreasonable as to require a party to prove a negative by way of anticipation to an affirmative defence. The Appellants assumed, and, as it appears to me, properly assumed, the defence by their plea in law, and by the Act of 6 Geo. 4, c. 120, their plea in law is to be held on the sole ground of their defence, and therefore I apprehend that the onus of proving that the goods had been returned, or that there had been an offer to return them, lay upon the Appellants.

Now the questions which arose upon the pleas in law were these—First, did the wine correspond with the sample? Secondly, was there any improper delay in discovering the defective quality of the wines? and, thirdly, was there any improper delay in the offer to return them?

With regard to the wine not corresponding with the sample, there can be no doubt whatever that large quantities of the wine in both lots were utterly bad, and could in no way whatever be said to conform to the sample. And, therefore, upon the discovery of that fact, the Appellants had a clear right, not, as appeared to be contended in the course of the argument, to retain the good wine and return the bad, but to rescind the contract for those lots altogether. The contracts being entire for each lot, the only way in which the Appellants could discharge themselves from their obligation was by returning, or offering to return, the whole of the lots.

Now, was there delay in ascertaining the defective quality of the wine? It appears that at least the muddy unpleasant state of the wine might have been discovered in the course of a week, perhaps,

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at the most. And therefore, I think that the time which was taken by the Appellants before they discovered these defects, amounted to an improper delay.

But with regard to the offer to return the lots, the case is so perfectly clear against the Appellants that I should be content to rest my opinion entirely upon that point alone. Where a party desires to rescind a purchase upon the ground that the quality of the goods does not correspond with the sample, it is his duty to make a distinct offer to return, or in fact to return the goods by stating to the vendor that the goods are at his risk, that they no longer belong to the purchaser, that the purchaser rejects them, that he throws them back upon the vendor's hands, and that the contract is rescinded.

Now, was there any such offer made on the part of the Appellants in this case? I am quite clear that there never has been, from first to last, any such distinct notice or offer to return the goods as was required to enable the purchaser to throw up the contract, and so to relieve himself from the liability of paying the price of these goods; and therefore I think, with my noble and learned friend, that the interlocutor ought to be affirmed.

LORD COLONSAY:—

The point we have now to determine is, whether the Appellants did in due time offer to return the goods—or rather reject the goods; because rejection implies all that was necessary upon their part, as purchasers of the goods, when they found that they did not accord with the samples. Now, it appears that neither was there a timeous notice of the goods being disconform to sample, nor was there throughout, until the 14th of June (and I doubt if even then), an offer or a proposal to return them, or a doing of that which was necessary to their rejection.

It appears that very soon after the sale the Appellants obtained samples, called in a skilled person to assist in examining them, and, being satisfied, they sent for and obtained the goods. A month elapsed before they did anything. It was not till the 6th of May that any positive objection was made to the particular lots. The matter went on in this way. Certain objections were taken; a correspondence ensued; but never at any stage—certainly not

until the 14th of June—does it appear that they rejected, in the proper and legal mode, those particular parcels. They did not state that they were at the risk of the seller; in short, they did not fulfil that which, for such a purpose, is incumbent upon a purchaser. They retained the goods and refused to pay the price for them.

Both parties were wrong in their views of the law in the early part of these proceedings. It appears that the Respondent was of opinion that all the purchases made at that sale were to be regarded as one transaction, and that it was not competent to the Appellants to object to any particular lots of the purchase. The Appellants were under that impression too; but the judgment pronounced by the Lord Ordinary (1) was that each lot was to be dealt with as a separate purchase. The sending of the summons to the agent of the Appellants, requesting him to accept the service for his clients, and his acceptance, is the strongest possible intimation that he no longer considered that they had then any right to rescind the contract.

The cases which have been referred to as impeaching the doctrine laid down by the Judges in this case are not at all in point, particularly the case of *Jaffe* v. *Ritchie* (2), which is wholly away from it. There the purchase was of flax yarn, and it turned out, when the bleacher came to examine the goods, that a large portion was not flax, but jute. It was held that the party was not bound to take jute instead of flax—a different article. I therefore, my Lords, come to the same conclusion as that of my noble and learned friends.

LORD CAIRNS:—

My Lords, I entirely agree with the judgment now proposed to be pronounced.

Interlocutors complained of affirmed, and appeal dismissed with costs.

Agent for the Appellants: *R. M. Gloag.*
Agents for the Respondent: *Simson & Wakeford.*

(1) Lord *Gifford.*

(2) 23 Dunlop, 242.

1858
June 23.

THE HERRIES PEERAGE CLAIM.

BEFORE THE LORDS' COMMITTEE FOR PRIVILEGES (1).

Descent of Peerages to Heirs Male.

Post 269.
1 Apps Cas 24

In the absence of contrary limitation, the invariable presumption of law is, that a peerage descends to heirs male, and not to heirs general.

The legal presumption in favour of heirs male may be rebutted by authoritative evidence, but not by inferential deduction. Were this rule departed from, many peerage claims would start up.

LORD REDESDALE (2):—

Having attended this case throughout, and having formed, after most careful investigation, a different opinion from that which has been expressed by the two noble and learned Lords who have preceded me (3); and conceiving, as I do, that the decision which may be come to in this case will tend very much to shake that which has hitherto been settled, I feel it my duty to lay before your Lordships the reasons which have induced me to come to a different conclusion.

The presumption in favour of a male descent where no instrument of limitation can be produced may be considered as finally settled by the opinion of Lord *Hardwicke* in the *Cassilis Case* in 1762 (4), which was confirmed by Lord *Mansfield* in the *Sutherland Case* in 1771 (5) and in the *Spynie Case* in 1785 (6); and by Lord *Loughborough* in the *Glencairn Case* in 1797 (7).

Lord *Mansfield* thus states the rule:—

I take it to be settled, and well settled, that where no instrument of creation or limitation appears, the presumption of law is in favour of the heir male; always open to be contradicted by the heir female upon evidence shewn to the contrary.

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(1) See 3 Macq. 585.

(2) Lord *Redesdale* is the elected permanent Chairman of the Lords' Committees—especially of the Committee for Privileges, the tribunal of Peerage Law.

(3) Lord *Cranworth* and Lord *Brougham*.

(4) *Maidment's* Report of the *Cassilis Peerage Claim*, pp. 58, 59, 60, 61.

(5) *Maidment's* Report of the *Sutherland Peerage Claim*, p. 9.

(6) *Maidment's* Report of the *Spynie Peerage Claim*, p. 10.

(7) *Maidment's* Report of the *Glencairn Peerage Claim*, pp. 6, 7; see also 1 Macq. 445.

It was settled by Lord *Hardwicke* that where no instrument of creation or limitation of the dignity appeared, the legal presumption was in favour of heirs male. It is not now open to litigate this general matter. I hold it to be of great consequence. The presumption in favour of heirs male has its foundation in law and in truth. I am satisfied many claims would start up were it departed from.

Now, my Lords, the very doubtful judgment after all which has been given by the two noble and learned Lords who have spoken (1) satisfies me that this legal presumption has been met only by presumption on the other hand, instead of by "evidence," which appears to be required by Lord *Mansfield*.

In this case no instrument of limitation is produced, and the presumption consequently is in favour of the title not having descended to an heir female. Mr. *Maxwell Constable* claims as heir-general of the first grantee, and proposes to contradict the presumption of law by proving, first, that *Agnes*, the eldest daughter of *William* the third Lord *Herries*, who died in 1543 without issue male, succeeded to the barony on his death; and, secondly, that her husband, Sir *John Maxwell*, who unquestionably sat in Parliament as Lord *Herries* in 1567, did so in right of her barony. Unless these two points are satisfactorily proved there is no contradiction of the presumption of law in favour of the heir male *by evidence shewn to the contrary*, which Lord *Mansfield* considered necessary in order to establish the claim of an heir female in similar circumstances.

In support of the first proposition, namely, that *Agnes* succeeded to her father's barony, certain contemporary instruments are produced in which she is designated as "Lady *Herries*;" but it is proved that she is not styled "Lady *Herries*" in the most numerous and most important instruments. And it is desirable to examine particularly this part of the case, which is the sole attempt to afford direct evidence that she ever was called "Lady *Herries*" till her husband became Lord *Herries*. The only documents in which she is called "Lady *Herries*" are the instrument of sasine dated the 12th of September, 1551 (but she is not so called in the precept or charter on which that instrument is founded);

(1) Both Lord *Cranworth* and Lord *Brougham* acknowledged the great difficulty of the *Herries Peerage Claim* upon the facts; see 3 Macq. pp. 599, 600. A desire was expressed that a full report of Lord *Redesdale's* speech, as delivered on the 23rd of June, 1858, should now be given.

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the instrument of redemption of the 6th of August, 1562; three instruments of 1564, and a resignation of lands by *Katherine Herries* in 1566. All those last five instruments were prepared by *Herbert Anderson*, the family notary. Your Lordships may remember the argument that was urged in the *Montrose Case* (1) upon the difference there was between what were called "home made" instruments and public documents. *Agnes Herries* is not designated as "Lady *Herries*" in any very important documents. There is a contract regarding the resignation of the before-mentioned lands (part of the barony of *Terregles*) by *Katherine*, in which the reason for the act is stated to be a desire to set up the House of *Terregles*, dated the 22nd of March, 1561; and a precept of seisin from *Archibald Herries* relating to the lands of *Reidcastle* (part of the barony of *Terregles*), of the same date, the 22nd of March, 1561; both of which were prepared by *Herbert Anderson*, the family notary. In these documents, which are not documents of the lady herself, she is not called "Lady *Herries*." Now these documents are important. By these surrenders of *Katherine's* share of the barony and the *Reidcastle* portion of the same which had gone to the heir male, the whole land barony of *Terregles* became for the first time vested in Sir *John Maxwell* and his wife. In these two deeds of 1561, in which the family notary of the *Maxwells* is employed, he does not designate *Agnes* "Lady" *Herries*, but in 1562 and 1564 he does so in several notarial instruments, and again in 1566 in the deed by which *Catherine* completed the contract. These documents, therefore, give some countenance to the idea that some connection was supposed to exist between the land and the parliamentary barony, and that when *Agnes* had got the whole of the land barony, she set up a claim to the other. This point has some bearing on other transactions to be treated of hereafter.

It is to be observed that *Herbert Anderson* is concerned in all the documents in which she is designated "Lady" *Herries*, except the instrument of sasine, in 1551, in which, however, she is only so called in the "home-made" part of the deed, and not in the charter on which it is founded; and that for eleven years afterwards no other instance of her being similarly designated is produced.

(1) 1 Macq. 57, 401, *passim*.

It is important, also, to observe that she is never called "Lady" *Herries*, nor calls herself so, in any instrument in which the Crown is concerned, nor in any but "home-made" instruments. Especially she does not so designate herself in her surrender to the Crown of her share of the barony of *Herries*, in April, 1556, in which it seems hardly possible that she could have omitted so to style herself if she was in a position to claim her right to the barony in any transaction with the Crown. It is a personal act, in which she alone is concerned, and she is consequently not described in connection with her husband; but she calls herself only "*Agnes Herries*, the elder of the daughters and heirs of *William* Lord *Herries*." This deed was witnessed, and probably prepared, by *Herbert Anderson*, the family notary, who in private instruments for many years previous had called her "Lady" *Herries*. She is also called *Agnes Herries* in the charter from the Crown of the 8th of May, 1556, re-granting the whole barony to Sir *John Maxwell* and herself, which was a very short time before he sat in Parliament as Lord *Herries*. It is hardly possible to conceive what can be considered direct proof of any fact if this document is not held to be so as to her not being at that time recognised by the Crown as "Lady" *Herries*.

Leaving now that part of the evidence by which it is proposed to support the claim of *Agnes* to have succeeded as Lady *Herries* on the death of her father, we must proceed to consider that which is founded on the fact that *Archibald Herries*, the undoubted heir male, did not take the title on the death of *William* Lord *Herries*. This was the only fact on which the Lord Advocate appeared to admit that the claimant could in any way rest his claim, and it appears to me that nothing can be more dangerous than that the Committee should set aside the legal presumption in favour of the heir male on this indirect evidence if they agree with the Lord Advocate in considering that the direct evidence of *Agnes* having succeeded to her father's barony as Lady *Herries* is altogether insufficient to establish that fact. The Committee must consider and determine this point as if there was an heir male before us claiming the ancient barony; and all that he might be allowed to allege in answer to the objection raised by the Petitioner to his right on account of his ancestor not having claimed, and even

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having waived his claim on the death of *William* in 1543, must be allowed in argument on the present occasion.

It has been distinctly laid down by the House in the *Devon Case* (1) that no failure on the part of the immediate heir or of his descendants to claim a peerage, nor even the general belief of those heirs and of the Crown during centuries that they had no right to it, can be held to preclude its being afterwards adjudged to belong to them. The decision in that case shews clearly that neither the fact of *Archibald Herries* having failed to claim the barony in 1543 or afterwards—even although this arose from a belief that he was not entitled to it—nor the creation of another barony of *Herries* in the person of Sir *John Maxwell* in 1567, would bar the right of the heir male if he was now to claim the title; and consequently it would be most dangerous to admit that as the barony did not become extinct it must have gone to the heir female merely because the heir male did not claim it. If the heir female shall be admitted upon any evidence which does not directly prove that she did enjoy the title, and was acknowledged to do so before her husband sat in Parliament in 1567, the legal presumption in favour of the heir male must be departed from, and those evils which Lord *Mansfield* anticipated would ensue if that principle should be unsettled may be confidently apprehended.

As, however, the point was considered by the Lord Advocate to have some weight in support of Mr. *Constable Maxwell's* claim, and as it cannot be denied that the fact of the heir male not claiming would afford indirect evidence in favour of the claim of an heir general, if that claim were otherwise adequately supported, it will be desirable to inquire what may have probably been the reasons which prevented *Archibald* from advancing his claim.

Nothing can be more certain than that the rules which now govern the succession to peerages were not as clearly defined and known in the sixteenth century as at present. It has been already shewn that the legal presumption in favour of heirs male in cases in which no instrument of limitation can be produced was only finally settled in the last century, and the occurrences in this

(1) 2 Dow & Clark, p. 200; see also the separate report of Sir *Harris Nicolas*.

particular case afford a strong presumption that on the death of *William* Lord *Herries*, leaving three daughters co-heirs to the greater portion of the land barony of *Terregles*, and an heir male of the body of the first grantee, the question as to the inheritance of the parliamentary barony was considered a very doubtful one. It is desirable to notice what had occurred respecting the land barony of *Terregles* between 1543 — the year of *William* Lord *Herries*' death—and 1567, when Sir *John Maxwell* first sat in Parliament as Lord *Herries*. In the first-mentioned year, a short time before his death, *William* Lord *Herries* settled the lands of *Reidcastle* (part of the barony of *Terregles*) on himself and his wife, and the longest liver of them, with remainder to his heirs male, the charter at the same time stating that he intended these lands to revert ultimately to the barony of *Terregles*, which were under settlement to heirs-general. No argument was raised by either side—the Petitioner or his opponent—on the contradiction involved in this disposition of the lands of *Reidcastle*, though it certainly appears to require some explanation. On *William* Lord *Herries*' death the lands of the barony of *Terregles* were divided between his three daughters, and (but not until the death of his widow in 1561) the lands of *Reidcastle* went, under the above-mentioned charter, to *Archibald Herries*, of *Maidenpaup*, the heir male of the first grantee of the peerage.

It is impossible to know at this distant period, in the absence of all evidence on the subject, whether the heir male put forward any claim or not in 1543 or afterwards. He did not succeed to any part of the land of the barony till, I think, the year 1561. All that we do know is, that in 1562, about nineteen years after the death of *William* Lord *Herries*, *Archibald Herries* sold to Sir *John Maxwell* the lands of *Reidcastle*, which had descended to him as heir male under the settlement of those lands before mentioned to have been made by *William* in 1543, and in the instrument of conveyance made no claim to the title, and that Sir *John Maxwell* at various times after his marriage with *Agnes* succeeded in obtaining from the other co-heirs their portions of the lands of the barony of *Terregles*; and that it was not until they had been so concentrated in him that he sat in Parliament as Lord *Herries* of *Terregles*.

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Having these facts in view, and bearing in mind that the indisposition which has been evinced by the House in modern times to recognise any connection between the tenure of lands and the succession to titles of honour has by no means been universally acknowledged as warranted by Scotch authorities, it is hardly possible to avoid admitting that the want of possessing the land barony of *Terregles*, or even the *caput baroniæ*, may have been considered by *Archibald Herries* a bar to his claiming the parliamentary barony, or, at all events, that it was sufficient to prevent his having that claim acknowledged in opposition to the powerful influence of Sir *John Maxwell*.

The second point to be established by the claimant is, that Sir *John Maxwell* sat in Parliament in 1567, in his wife's barony. The only evidence in favour of this is, that in 1606, in the decreet of ranking, her grandson appears to have been allowed the precedence of the ancient barony. The incorrectness of this decreet is however so clearly proved, that no reliance can be placed upon it unless otherwise supported. It is disputed constantly at the elections of Scotch peers to this day. It was made up in some cases from evidence produced by the peers themselves, several of whom did not appear before the Commissioners, and from extracts from the register of Parliament, and other public records. Lord *Herries* appeared, and it is remarkable that the only document he produced is the enfeoffment of the barony of *Terregles* to *Andrew*, son of *Herbert* Lord *Herries*, 25th of February, 1499, under which charter he did not hold the barony of *Terregles*, and that he kept back the charter to Sir *John Maxwell* and his grandmother in May, 1566, under which he did hold. There was no male heir of *Andrew's* body, but there was of *Herbert's*. The Commissioners appear to have recorded whatever was thus brought before them. The point is not of much consequence, but noticeable, perhaps, as all the deeds were unquestionably in possession of the family. They have all been produced before the Committee. He wished, no doubt, to connect his sitting with the ancient barony, and produced that document only which best served that purpose. That this precedence was apparently not allowed to his father will be noticed hereafter.

Against Sir *John Maxwell* having become Lord *Herries* in right

of his wife there is an accumulation of evidence of the strongest character, direct as to the fact itself, and indirect as shewing that he sat under a new creation. First, there is not a scrap of evidence to shew that *Agnes* was ever recognised as a peeress until her husband became Lord *Herries*, and (as before stated) she clearly was not so recognised by the Crown on the 8th of May in the year preceding that in which he first sat in Parliament.

Secondly, he did not assume the title till nineteen years after his marriage. This is felt to be a strong argument against the claimant, and is thus met by his counsel. Mr. *Fleming* urges, first, that a husband had no right to sit in his wife's barony, and that if the consent of the Crown was necessary, it could not be done under a Regent: that Queen *Mary* did not arrive in *Scotland* till 1561, and did not call a Parliament till 1563: that Sir *John Maxwell's* brother, Lord *Maxwell*, died about 1552, leaving two infant sons—Sir *John* being their tutor: that Parliament then consisted of Lords of Parliament and lesser barons, or tenants in chief of the Crown: that Sir *John* sat in Parliament as Master of *Maxwell* in 1551, and as Sir *John Maxwell* in 1561: and that probably while he acted as tutor for his nephew, and was styled Master of *Maxwell*, he did not desire to be called to Parliament as Lord *Herries*.

Mr. *Fleming* cites various cases, English and Scotch, to support the argument that the husband sitting in Parliament in his wife's barony was not a right but only a capacity. The English cases are not to be relied upon for Scotch practice. The Scotch cases only shew that in several instances a husband did not take his wife's title. The point is a very doubtful one. Lord *Camden*, in his speech on the *Sutherland Case*, says that he is not sure but that the husband had a right to sit in Parliament in right of his wife, and quotes cases. But be this so or not, it has at all events no bearing on the question so far as it relates to Sir *John Maxwell's* position from 1561, when Queen *Mary* returned to *Scotland*, to 1567, during which time he was in high service and favour with the Crown. The argument that while he sat as tutor for his nephew, or as a lesser baron, he did not desire to be called to Parliament as Lord *Herries*, is really too weak to be worth noticing. On this part of the case it must be acknowledged that his not

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being recognised as Lord *Herries* for eighteen or nineteen years after his marriage, under the relations of service and favour in which he stood with the Crown, is about as strong presumptive evidence as could well be offered against the right of his wife to that title during that period.

Now for the indirect evidence, namely, that which shews that Sir *John Maxwell* was created Lord *Herries*. First, it is shewn that he is denominated Sir *John Maxwell*, Knight, in a document dated the 12th of December, 1566, and in another on the 12th of March, 1566–7, he is called Lord *Herries*. He thus clearly became a peer between these periods. The christening of Prince *James* took place on the 17th of December, 1566. Ancient historical documents record that on that occasion he was created Lord *Herries;* the above dates strongly corroborate this.

Secondly, he does not appear to have been allowed the precedence of the ancient barony. I think it was sufficiently shewn that the order in which peers were placed in the records of Parliament and Council affords no guide to their relative precedence, and that they were perhaps frequently put down very much in the order in which they came. But as it is probable that this was in many cases not done till several had arrived, and that those present when the clerk commenced the entry were more or less accurately set down in their rank, the very low placing of this Lord *Herries* cannot be altogether passed over without notice. But there is one instance given in evidence in which it is hardly possible to conceive that the peers named were not placed accurately according to their rank, namely, in the Act of the King in Council nominating eight noblemen for the reconciliation of his nobility on the 22nd of September, 1578, eleven years after he first sat as Lord *Herries*. In this he is placed after the Lord *Ogilvy*, whose creation is recorded in the Acts of Parliament to have taken place in 1491. If Lord *Herries* sat in his wife's barony, which would have dated from 1489, he would have had precedence of Lord *Ogilvy*. He could only be placed after him as having been created in 1567.

Thirdly, his son sat in Parliament immediately after his father's death in the lifetime of his mother. *John* Lord *Herries* died on the 20th of January, 1582–3, his wife not till the 14th of March,

1593–4. Her son sat the whole time as Lord *Herries.* Within eight days of his father's death the King nominated and appointed *William* Lord *Herries* (not the Master of *Herries*), to be of the number of his ordinary Privy Council, in the place of the late Lord *Herries* his father. Mr. *Fleming* says that he was called up in his mother's barony. He does not quote a single case of a son being so called in *Scotland.* Elder sons of peers frequently sat as peers in Parliament in *Scotland* (they could not sit as lesser barons) but almost always (two cases alone, I think, were given to the contrary) as "Masters" of *Crauford, Eglinton,* &c., even when elder sons of earls. The sitting of the son is strictly in accordance with what would have happened if his father had been created Lord *Herries,* and no evidence is given to shew that it was so if his father had sat in his mother's barony. This point appears to me conclusive against the claim.

I think also it is important to notice, fourthly, that the settlement of the lands of the barony in the charter to Sir *John Maxwell* and his wife was on the 8th of May, 1566, only a few months before he became a peer, and evidently preparatory to that expected event. It was to him and his wife and their heirs male, and failing such heirs male to his own heirs male whatsoever. The Queen was then close on her confinement, Prince *James* having been born on the 19th of June, and the advancement of Sir *John Maxwell* to the peerage was probably promised, and only delayed that it might be given with others in connection with the rejoicings on the christening which was subsequently deferred till December. It is important to notice that Parliament certainly sat in the autumn of that year, because there is an Act of Parliament of the 6th of October, 1566, in which a grant of money was made for the christening, we see him in a document on the 12th of December in that year still styled "Sir *John Maxwell.*" Therefore it is as clear as possible that it was in connection with the christening on the 17th of December that he first became a peer. Now if he was to be called up in his wife's female barony, the settlement not only on the heirs male of their bodies, and failing those on his heirs male whatsoever, thereby excluding the heirs general of their bodies who would succeed to the title from the lands of the barony, and giving those lands to *Maxwells* who

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would not succeed to the title, and who might not even have a drop of *Herries* blood in their veins, appears so contrary to reason as to afford strong presumptive proof of a new creation and a male inheritance.

On the one side, therefore, we find these two facts only opposed to the presumption which we are bound to entertain in favour of heirs male. First, the non-assumption of the title by the heir male; and, secondly, the precedence claimed in the decreet of ranking. In favour of the presumption, we have, first, the non-admission of the right of the heir female, it having been clearly shewn that from the death of *William* Lord *Herries*, in 1543, to 1567, when her husband became Lord *Herries*, *Agnes* was never acknowledged as a peeress in any public document, though she is named in some of so important a character that the absence of acknowledgment of her as a peeress in those documents affords satisfactory proof that she could have had no claim to be so acknowledged. Secondly, that her husband was married to her nineteen years before he became Lord *Herries*, though he was high in royal favour during a great part of that time. Third, that the time and circumstances attending his elevation to the peerage strongly confirm the historical statement that he was created Lord *Herries*. Fourth, that the settlement of the lands of the barony on his heirs male favours that presumption and negatives the other. Fifth, that the precedence given to Lord *Ogilvy* over him in the Act of the King in Council before mentioned is almost conclusive on that point, far more so than any support the claimant can derive from the decreet of ranking. Sixth, that the succession of his son to the barony during his mother's life is, in the absence of all proof that he could have so succeeded, and in contradiction to the evidence that as eldest son, if called by the favour of the Crown to the Upper House, he would have sat as the Master of *Herries*, conclusive on the subject.

It appears to me, that it is proposed to meet the legal presumption by presumption only, instead of by evidence to the contrary, as laid down by Lord *Mansfield*. No one can say that the non-assumption of the title by the heir male, or the precedence given by the decreet of ranking, do more than afford a ground for presumption. I think that the evidence against the claim is more than presumption; but

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that even if it be not, the legal presumption cannot be set aside because of such failure of direct proof. I am, therefore, of opinion that *William Constable Maxwell* has not made out his claim to the barony of *Terregles*. It appears to me that, according to the rules which now govern the succession to peerages, the barony granted to *Herbert* Lord *Herries*, in or about 1489, descended to the heirs male of his body, and is in them, if any such exist; and that the barony granted in 1567 to Sir *John Maxwell*, according to those rules, is in the heirs male of his body, except so far as the same may be affected by any unreversed attainder (1).

THE BREADALBANE PEERAGE CLAIM.

1872
July 25.

BEFORE THE LORDS' COMMITTEE FOR PRIVILEGES.

Scotch Earldom—Heir Male.

The pedigree shewing clearly the claimant's title as the nearest heir male of the *Breadalbane* family:—

Held, that his claim was "made out."

Right to Vote in respect of a Peerage.

Under the 10 & 11 Vict. c. 52, s. 4, when the right to a peerage or the right to vote in respect of a peerage is established and notified to the Lord Clerk Registrar by order of the House of Lords, no one except the individual whose right is so established shall during his or her life be allowed to vote in respect of such peerage until the House of Lords shall otherwise direct.

IN this case the Petitioner's claim was referred by Her Majesty the Queen to the consideration of the House.

The late *John Alexander Gavin Campbell* of *Glenfalloch* and *Taymouth Castle*, having died in 1871, was succeeded by his eldest son and heir, born on the 9th of April, 1851, who now claimed the honours and dignities of his distinguished family as the nearest heir male (2) of *John* the first and *John* the fifth Earls of *Breadalbane;* the Petitioner praying a seat in the House as Earl of *Breadalbane* and *Holland*, Viscount *Tay* and *Pentland*, Lord *Glenorchy*, *Benederaloch*, *Ormelie*, and *Weick*, in the peerage of *Scotland*.

(1) For the full particulars of the *Herries Case*, see 3 Macq. p. 585.

(2) As to the right of *heirs male*, see Lord *Redesdale's* speech in the preceding case, *infra*, p. 258.

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Sir *Roundell Palmer*, Q.C. (1), Mr. *Fleming*, Q.C., and Mr. *Adam*, were of counsel for the claimant.

The *Attorney-General* (2), the *Lord Advocate* (3), and Mr. *Sellar*, attended on behalf of the Crown.

The question was one purely as to evidence of pedigree; and that evidence was deemed throughout satisfactory, the Peers delivering the following opinions:

THE LORD CHANCELLOR (4):—

My Lords, in this case the pedigree, as has been stated by the Lord Advocate, appears to have been most completely established by the evidence which was given in the original cause concerning the *Breadalbane* estates which was appealed to this House (5). But it has been necessary to place that evidence before your Lordships again, that evidence having been taken in a suit between the parties claiming the *Breadalbane* estates, and not in an inquiry concerning a seat in your Lordships' House. Nevertheless the evidence adduced in that suit was carefully watched, for there was a keen interest on the part of those who were concerned in the result, and we have now had the advantage of having the Lord Advocate to watch the evidence which has been given in support of the claim which is now made before your Lordships. Therefore we may say that there can be no doubt whatsoever that the title is clearly and distinctly traceable to the father of the present claimant.

We have had evidence at your Lordships' bar by which the whole history of the father of the present claimant is traced. He appears to have acted throughout as a domiciled Scotchman, and never to have been absent from *Scotland* except as an officer of Her Majesty's army. Now it is a perfectly settled law that a person does not by serving Her Majesty in any places where he may be called upon to serve displace or forfeit his domicile.

(1) Sir *Roundell Palmer* was at *Geneva*, attending the *Alabama* arbitration, when the *Breadalbane* case came before the House.

(2) Sir *John D. Coleridge*, Q.C.

(3) Mr. *George Young*, Q.C.

(4) Lord *Hatherley*.

(5) 4 Macq. 711; 3rd Ser. of Scotch Cases, vol. i. p. 991.

Therefore it appears to me that the title of the claimant as a Scotch earl has been fully established in evidence before your Lordships, and I shall venture therefore to take upon myself to move your Lordships to come to a resolution to that effect.

LORD CHELMSFORD:—My Lords, I need not say more than that I perfectly agree with my noble and learned friend on the woolsack, that the claimant has most satisfactorily established his title to the Scotch earldom of *Breadalbane*.

LORD COLONSAY:—I am entirely of the same opinion.

Mr. *Fleming*:—Your Lordships are aware that the counter-claimant (1) has presented a petition to the Queen which Her Majesty has referred to this House. May I ask your Lordships to find that *his* claim has not been established, because this gentleman may present himself at the elections of Scotch peers, and that may lead to great confusion?

LORD CHELMSFORD:—I think you will find that the Act of the 10 & 11 Vict. c. 52, s. 4, provides for the contingency you anticipate. That Act provides that, when it has once been certified that a person has a right to a title, no other vote can be received in respect of that title than that of that person.

Mr. *Fleming*:—Then, my Lords, it is unnecessary to say more; but in the *Annandale Case* your Lordships decided against every claimant to the title. There were five or six claimants in that case, and your Lordships decided with respect to each of them that such and such a person had not made out his claim (2).

LORD CHELMSFORD:—It is a very difficult thing which you ask us to do. You ask us to come to a decision upon a claim which

(1) Mr. *MacCallum*, who was not represented by counsel, but appeared at the Bar in person.

(2) The documents cited by Mr. *Fleming* disclosed a remarkable fact, namely, that certain of the Scotch peers were in former times authorized to nominate their successors. Thus, on the 14th of July, 1685, the then Earl of *Breadalbane* appointed his second son to succeed him in the dignity, the eldest son, who was feeble, having resigned his birthright. In the *Errol* case the charter from the Crown limited the title "first to the heirs male of the body, secondly to the heirs female of

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has not been fully brought before us. If you look at the statute I have mentioned I think you will be perfectly satisfied that the provision is sufficient (1).

THE CHAIRMAN (2):—The *Annandale Case* was quite different from this, because nobody was found to have made out his claim in that case. Here we say that a certain person has made out his claim. If that does not bar another person from voting in respect of the same title I do not know what does.

On the report of the Committee, the House resolved and adjudged that "the claimant hath made "out his claim, and ordered that the Lord "Clerk Registrar do receive and count his vote "in respect of the said Earldom; the resolution "and judgment to be laid before Her Majesty "by the Lords with white staves, and to be "transmitted to the Lord Clerk Registrar in "*Scotland*."

Claimant's Agents: *Loch & Maclaurin.*
Crown Agent: *Hugh Hope.*

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the body, and thirdly to such person or persons as it should please the then Earl to nominate to be heirs of entail of the dignity and estate." The *Roxburgh* peerage furnishes another example of this power of nomination, which was exercised in favour of a younger son of the Earl of *Perth*; so likewise did the Scotch peerages of *Rutherford*, *Mar*, and *Maderty*. Similar attempts were made in *England*, but without success. Thus, in the *Purbeck* case a fine was levied to alter the descent of the peerage; but the House of Lords determined that this could not be done. See Lord Chancellor *Loughborough's* speech on the 19th of May, 1787, as given in printed papers submitted to the House of Lords.

(1) The words of the Act are as follow: "Be it enacted, that whenever any peer or peeress shall have established his or her right to any peerage, or his right to vote in respect of any peerage, and the same shall have been notified to the Lord Clerk Registrar by order of the House of Lords, the said Lord Clerk Registrar or Clerks of Session shall not during the life of such peer or peeress allow any other person claiming to be entitled to the same peerage to take part in any such election, nor shall it be lawful for the said Lord Clerk Registrar or Clerks of Session to receive and count the vote of any such other person till otherwise directed by the House of Lords."

(2) Lord *Redesdale*.

JAMES GOWAN . . . . . APPELLANT; 1873
B. CHRISTIE AND MRS. CHRISTIE . . . RESPONDENTS. *Feb.* 14.

Obligations of a Mineral Lease.

When the thing let turns out to be a nonentity, the lessee is not bound.

Per THE LORD CHANCELLOR:—In such a case it is perfectly reasonable that the lease should be subject to reduction.

Per LORD CHELMSFORD:—Where there is a total destruction or exhaustion of the subject matter of a lease, the lessee is entitled to abandon it.

Perils of the Lessee.

Per THE LORD CHANCELLOR:—The lessee of a mine, although entitled to rely on the existence of the subject matter, takes all risk of its failure, either as to quantity or value, unless either is expressly warranted.

Unworkability to Profit.

At common law, the mere fact of "unworkability to profit" affords no ground for reducing or throwing up a lease of minerals, which are in their nature subject to many vicissitudes. There is in such a case no legal warranty on which the lessee can rely.

Difference between Mineral and Agricultural Leases.

Per LORD CAIRNS:—What we term a mineral lease is really a sale out and out of a portion of the land. *Dicta* therefore applicable to agricultural leases are not always applicable to leases of minerals.

THE question in this case turned on the obligations of a mineral lease; the tenant under it urging that, by reason of the sterility or exhaustion of the subject matter, he ought to be discharged from his contract, as the premises, he alleged, were unworkable to profit, even though no rent should be exacted.

The Appellant commenced his action in May, 1870, for reduction of this lease, which had been granted to him in February, 1866, "of the freestone and minerals, and all materials and substances of what nature soever lying in and under certain lands" (in the pleadings specified), "with power to search for, work, win, and carry away the said materials and substances," at a rent of £200 per annum; the lease being for twenty-one years; but with a stipulation that no rent should be exacted for the first year, and with power to the lessee, at the end of the third, seventh, and fourteenth years, to determine and put an end to the lease.

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The grantor of this lease was the late Mr. *Alexander Christie*, of *Baberton*, who on his death, in August, 1868, was succeeded by his brother, as heir of entail of the estate. The suit, therefore, was directed against the brother, and also against the widow of the deceased, as his sole representative in moveables, and also in heritage, other than the entailed estate.

The Appellant's condescendence stated that he had been induced to accept the lease by the recommendatory descriptions of the grantor, his agents, and factor, to the effect that it was thoroughly capable of being worked to profit. In February, 1870, the Appellant took possession, and commenced his operations "by boring and otherwise;" but, according to the condescendence, he soon discovered that there was "no freestone, or other mineral, or material in the lands, capable of being worked to profit."

The Respondents, on the other hand, denied the Appellant's allegations, and insisted that "the freestone in the said lands was workable to profit."

The Lord Ordinary (1) found that the Appellant's assertions of misrepresentation were not sufficient in law to support the conclusions for reduction of the lease. But as to the allegations respecting "unworkability to profit," his Lordship allowed a proof, adding the following explanatory note:—

> The Pursuer avers that he entered into the lease under essential error, induced by the representations of the late proprietor of *Baberton*, and of his agents and factor. These representations, it is said, were to the effect that there was a large stratum of freestone in the lands of *Baberton* proposed to be let, that it was of superior quality, and that it was capable of being worked to profit by a tenant. It is not averred that the representations were false and fraudulent. The Pursuer's statement is only that there is "no such amount of freestone as was represented to him." The capability of the freestone of being worked to profit depends on many contingencies. It is averred by the Pursuer that he was not, at Candlemas, 1869, that is, after three years' possession and trial of the freestone, satisfied that there was no such freestone in the lands as had been represented to him, and that he accordingly did not avail himself of the break in the lease at that term, but continued his operations, although the next break did not occur until Candlemas, 1873. The present action was not raised until fifteen months thereafter,—that is, until after the Pursuer had been upwards of four years in possession of, and working the subject of the lease.

The Respondents reclaimed to the Inner House (First Division), and the Appellant obtained leave to amend his pleading, by adding

(1) Lord *Mackenzie*.

to the words "capable of being worked to a profit in a mineral lease," the words "even if no rent were to be paid."

The Inner House (First Division) recalled the Lord Ordinary's interlocutor, whereby he had allowed evidence to be gone into as to the allegation of "unworkability to profit;" the Inner House holding that there was no legal relevancy in the Appellant's averments, and that they were wholly insufficient to justify the prayer of his summons (1). Against this judgment the present appeal was tendered to the House of Lords; Mr. *Pearson*, Q.C., and Mr. *Taylor Innes*, of the Scotch Bar, being of counsel for the Appellant. Their argument, and the authorities cited, are fully dealt with in the opinions of the Law Peers.

The *Solicitor-General* (2), and Mr. *Glasse*, Q.C., were not called upon to address the House (3).

The following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (4):—

My Lords, in this case, by allowing proof before answer, the Lord Ordinary did not decide the question of relevancy; but, on the reclaiming note, the Inner House found that there was no relevancy in the Appellant's averments; so that the real question now is, whether the Inner House was right or wrong in so deciding.

The burden of proof undertaken by the Appellant is certainly a very heavy one; yet Mr. *Innes* did not shrink from the principle involved in the form of remedy which is sought. He said that, in the view of the law, there was nothing at all to be leased. That was a startling proposition, looking at the instrument, and considering the nature of the subject matter which it comprehends, namely, all the minerals and materials under particular lands, freestone being specially but not exclusively mentioned, and all other minerals of whatsoever kind they might happen to be. The principle of the argument was, that by the Roman Law, adopted into the Law of *Scotland*, there is a warranty implied or expressed

(1) Court of Session Decisions, 3rd Series, vol. ix. p. 485.

(2) Sir *George Jessel*, Q.C.

(3) The case is fully reported in the 3rd Series, vol. ix. p. 485.

(4) Lord *Selborne*.

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(I do not know which it may be, but that there is certainly a warranty in one way or the other) of possession of a subject capable of producing the contemplated fruits or profits.

Now, in one point of view, such a doctrine may be, and I venture to say is, perfectly intelligible and perfectly reasonable. When there is that which, in the language of the law of this country, would be called a total failure of consideration—when the landlord has not the thing to let which he purports to let, and which is the consideration for the rent, it is perfectly reasonable that the whole lease should fail *ab initio*, and be subject to reduction. Nor is it a very wide extension of that principle to say that if a landlord warrants a continuation of the subject matter for a certain number of years, a total failure of the subject matter before that number of years has elapsed shall involve a reduction or termination of the contract at the time of that failure and thenceforward. Those views are perfectly intelligible. But they all resolve themselves into either the original non-existence or the subsequent exhaustion or failure of the subject matter. And when the authorities which have been referred to are considered, they will be found, with a few, if any, exceptions, to turn entirely upon that principle so understood. The Roman text, *si frui non liceat* (1), points at cases where possession is not given; where there is no prestation of the subject matter, or where some external *vis major*, not inherent in the subject matter, and not the fault of the tenant, takes the subject matter away, either temporarily or permanently; but the principle is always the same, resting on the destruction *pro tanto*, or entirely, of the subject matter. But Lord *Stair* (2), the authority on the law of *Scotland* chiefly relied upon, goes further, and, as it seems to me, lays down the true principle in the most unequivocal terms. He says that there is a peril or risk undertaken by the lessee, that he is at the risk of the quantity and the value of the subject matter, but he is not at the risk of the being or existence of it.

If there had been in this case a lease of some particular descrip-

(1) Dig. 19. 2. 15. 1.: *Ex conducto actio conductori datur, si re quam conduxit frui ei non liceat.* In the Roman Law mines and quarries are uniformly spoken of as yielding *fructus*. Dig. 7. 1. 9. 1.; Ibid. 24. 3. 8.

(2) Book i. t. 15, s. 2, under the heading of *Location* and *Conduction*.

tion of minerals only—for instance, of a bed or seam of coal, or of a bed of freestone—and if there had been no such thing in existence, then, according to Lord *Stair's* principle, the tenant would not have been at the risk of the "being or existence" of the coal or the freestone. But that, of course, cannot apply to a case where the lease is of *all* minerals; for although there is necessarily some uncertainty and speculation in such a lease, because the minerals may turn out to be of greater or less value, yet some minerals there necessarily must be under every parcel of land, and therefore the peril of the "being" of the minerals is a peril which no tenant of such a mineral lease incurs; nor does the landlord incur it either. But with respect to the quantity and value, which is the whole matter in controversy here, as I understand the case, according to Lord *Stair's* doctrine, the whole peril of the quantity and value is under such circumstances upon the tenant; so that that authority is directly against the Appellant's case.

Then we are referred to Lord *Bankton*, who in the passages quoted seems to say that the landlord warrants a capacity to produce fruits (1). What is the meaning of that? A capacity to produce the kind of fruits which, according to the substance of the contract, the tenant is to receive. What are the fruits within the meaning of that principle? If, for instance, land is let as good arable land, and it turns out to be totally incapable of any agricultural produce, I can understand that in that case the principle might apply, and that there is a failure of the warranty to produce fruits. Again, I can understand that if, in the case of a mineral lease, the landlord, in substance, represented that there was workable coal, and the coal turned out, as in the case of *Murdoch* v. *Fullerton* (2), to be so nearly exhausted that there was no area of the least value for working—in other words, nothing which could be worked—a thin seam, for example, of a finger's breadth—something which was not practically useful for the purpose of working at all—it may be said that in such a case there was a failure of the landlord's warranty. But the fruits in this case are minerals to be got by working, and according to Lord *Stair* the quantity and the value of them, if they can be got by working, are at the risk of the tenant. If the minerals can be got, there are the

(1) Vol. i. 20, 13, 14; vol. ii. 2, 9, 24. (2) Feb. 12, 1829. 7th Series, p. 404.

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fruits, and there is no failure whatever of fruit in such a case. There is no sterility as long as there are minerals which may be got.

The case of *Edmiston* v. *Preston* (1) would be regarded at the present day as turning upon a thing for which the tenant was responsible. But the principle upon which that case was decided was evidently the same as if an earthquake or some natural convulsion had made the mine practically unworkable.

The case of *Dixon* v. *Campbell* (2), as far as it is fit to refer at all to an authority turning upon contract and not upon general law, is strongly against the Appellant's argument, because in that case, there being an express contract that if the mine should cease to be capable of being worked to advantage by reason of that class of accidents which all these authorities contemplate, the tenant might throw it up, it was expressly laid down that he could not throw it up for a failure which did not occur in the mine, but in the profits, on account of the variations in the market price. What has arisen in the present case but a question of market price?

The third article of the condescendence tells us that there is freestone under the lands of *Baberton*, and that four years were occupied in boring and in other operations to obtain it. I pass over the allegation that the quantity is less than was represented, for nothing now turns upon that. The Appellant goes on to say: "Nor is the said freestone, or any other mineral, or material, or substance in the lands so let, nor are all of the said substances together, capable of being worked to a profit in a mineral lease even if no rent were to be paid." I will stop reading that sentence there, because I agree with Mr. *Innes* that he does not take issue merely upon the point which follows, that the minerals are incapable of being remunerative at the rent stipulated for in the lease. He also says that even if no rent were to be paid they are not capable of being worked to a profit. He goes on: "The Pursuer has tried the said lands at all points shewing indications of freestone, but he has in every case been unable to turn out such a quantity as would repay his outlay, even upon the most economical methods which can be used for the efficient working of minerals." That allegation is consistent with the existence of an unlimited quantity of minerals capable of being

(1) Morr. 15, 172. (2) 2 Shaw's Appeals, 175.

worked and finding a market—but what he says is that they are not capable being worked to a profit—that so far as he has worked he has been unable to turn out such a quantity as would repay his outlay.

Therefore, the proposition really is this, that according to the principles laid down in the Law of *Scotland* the landlord guarantees the tenant against loss by reason of any of those elements extrinsic to the mine and independent of the nature of the subject-matter within the mine which go to the determination of the question of profit and loss. What are those elements? The quantity, the quality, the cost of labour, the cost of materials, the demand and supply varying in the markets, the accessibility of the markets themselves, and the means of conveyance—all which are things entirely extrinsic to the mine, and certainly not within the view of the principle laid down by any of the authorities to which a reference has been made. On the contrary, they are exactly those things as to which Lord *Stair* has said that the tenant runs the "risk of quantity and value."

My Lords, it therefore appears to me that even the authorities relied upon by the Appellant are against the view of the law which he suggests. But when we come to look at the stipulations in this particular lease we find that conclusion fortified by those stipulations. It is admitted that it is a very common thing with parties entering into mining leases to contract expressly that the tenant shall not be obliged to go on with the lease when he cannot work the mine to profit, and the parties very wisely add a clause providing for an arbitration. There is nothing of that sort in the lease before us, but there is a provision that at the end of three years, or at the end of seven, or at the end of fourteen years, the tenant may "break," as it is called, or throw up the lease; a provision absolutely irreconcilable with the whole principle of the Appellant's argument; because if the lease was vitiated from the beginning, and liable to reduction, it must have been upon grounds which are wholly independent of the exercise of an option at certain periods to retain or to throw it up. I had really great difficulty in understanding whether it was seriously meant to be contended, that because the lessee had made no profit he would not only have a right to throw it up, but he would also have a right to repetition

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of the rent he had paid. That seemed to me to be almost a necessary consequence of the Appellant's argument, although utterly inconsistent with the whole intent and purpose of the express contract between the parties. On these grounds, my Lords, I am of opinion, that the interlocutors appealed from ought to be affirmed, and the appeal dismissed with costs.

LORD CHELMSFORD :—

My Lords, I entirely agree with my noble and learned friend.

The law, as laid down by Mr. *Bell* (1), makes it quite clear that where there is a total destruction or exhaustion of the subject-matter of a lease, there the lessee is entitled to abandon it. But I am not aware that where it is a case of sterility merely, the tenant has any such right. The old authorities upon the subject rather, to my mind, indicate directly the contrary.

A distinction has been taken between agricultural and mineral leases, upon the ground that a lease of minerals is a hazardous speculation; and Lord *Deas* (2) says, that he knows no case where a mineral lease has been brought to an end upon the ground of sterility.

Here the Appellant has fenced himself round against the possibility of loss by reason of the sterility of the subject matter. He stipulates that for the first year no rent whatever shall be payable. He then stipulates that upon giving six months' notice at the termination of the third, the seventh, and the fourteenth years respectively, he may without any cause assigned abandon the lease. Now this is entirely for the benefit of the tenant. The landlord has no corresponding right of giving notice and turning the tenant out of possession. Therefore it seems a most reasonable thing to hold that where a special contract of this description is entered into (even supposing the common law would give the right of reducing the lease, which I am quite certain from the authorities it would not) it is impossible to say that the tenant can be fairly and reasonably entitled to reduce the lease, even supposing circumstances existed which without a contract would have entitled him to do so.

(1) Principles, sect. 1208.

(2) 3rd Ser. vol. ix. p. 490.

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LORD COLONSAY:—

The question is, whether the Appellant has presented such a statement as entitles him to be relieved from the contract, in respect of the fact that he cannot work these minerals to profit. I am not aware of any case in which that has been decided in regard to a mineral lease. All the cases, without exception, which have been put before us are cases substantially of the non-existence or exhaustion of that which had been the subject of the lease.

Now in this case the tenant has fenced himself round with protection as to any kind of occurrence that can take place. He did not stipulate for relief by means of a reference to arbitration. But he protected himself, as if he had no basis of common law to rely upon, by conditions which enabled him to break the lease at the end of three, seven, or fourteen years. I think the Court below has taken the right view in looking at what was in the contemplation of the parties, the contract being in every respect favourable to the tenant, who, in my opinion, has shewn no ground for the relief which he now seeks.

LORD CAIRNS:—

This case is at once an example of an attempt to make use of a suit for the purpose of obtaining relief upon a ground which was not in contemplation at the time when the suit was commenced, and of an effort to strain a well-known principle of law to a purpose to which that principle was never intended to apply.

The whole foundation of this suit originally was an allegation that there had been a specific representation, and an express warranty given by the lessor to the effect that there was "a large stratum of freestone in the lands proposed to be let, of a superior quality, and capable of being worked to profit;" there being no reference whatever to any implied warranty in law. The second article of the condescendence states that, "on the faith of these representations, and in and under an essential error as to the subject of the lease," the Appellant signed the lease in question.

These averments are now altogether out of the case, and we have an attempt to make out, that although there was no specific and express warranty, there is a law in *Scotland* which implies warranty to the same effect.

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My Lords, it appears to me that the observations of the Lord Ordinary in dealing with the question of express warranty and representation are very applicable also to the question of warranty implied by law. The Lord Ordinary remarks that such representations "are subject to many contingencies, as for example, the skill and capital of the tenant, the rate of wages, the state of the market, costs of transit, and many other elements of hazard; such representations therefore are mere matters of opinion, which, even if erroneous, could not form a good ground for reducing the lease" (1). I entirely agree with the observations of the Lord Ordinary; but I own I am at some loss to understand why they are not quite as applicable to a warranty implied by law as they are to an express warranty averred to have been given by the lessor; and I am at some loss to conceive when the Lord Ordinary felt that there would be these difficulties in allowing a proof as to express warranty, that it did not occur to his mind, that to a much greater degree they were impediments in the way of allowing proof as to what I have termed an implied warranty of law.

The averments do not even now assert that there are no minerals, or that there is no freestone; but merely that they are not capable of being worked to profit, an averment which implies their existence.

There is a common form of covenant in mining cases, that if the minerals cannot be worked to a profit, there shall be an opportunity to the lessee of giving up the lease upon certain terms stated. That covenant is generally accompanied with a specification of means for ascertaining by the award of arbitrators, or by the opinion of experts, whether it can be predicated of the mine at a particular time, that it cannot be worked to a profit. The word "profit" is there used in a sense altogether different from that in which the Appellant would use it here; because where you have an express covenant, "profit" does not mean gain after paying for work and labour, but it means gain after paying for work and labour, and the rent of the mine—a very different position of things from that for which the Appellant contends.

There is a well-known principle of the civil law, that where the

(1) 3rd Ser. vol. ix. p. 487.

subject matter demised turns out to be non-existent, or to be exhausted, or where the working of it turns out to be utterly impracticable, the tenant is relieved from the obligations of the lease. It is attempted to bring up that principle to this case, and to say that it gives to a tenant relief in the same way that the express provision, to which I have referred as being common in mining leases, where minerals cannot be worked at a profit, would give the tenant relief.

I asked the learned counsel for the Appellant, in the first place, Is there any decided case in support of that proposition? The learned counsel who argued for the Pursuer at your Lordships' Bar were unable to produce any. Undoubtedly, some institutional writers have been referred to, and I take Sir *George Mackenzie* as an example of them. Sir *George Mackenzie* (1) speaks of a tenant not being obliged to pay rent where there is sterility; and he says, describing it negatively, that there is no sterility where the fruit, the crop, the harvest, exceeds the value of the labour and of the seed. Even with regard to agricultural subjects, I should venture to doubt whether, at the present day, that *dictum* of Sir *George Mackenzie* is to be taken without very considerable qualification. I took the liberty of putting the case to the Appellant's counsel, that there might be a lease of waste or moor land, which a tenant might well be content to take, intending to reclaim it by degrees, and as to which in any one year, or in any small number of years, it might be utterly impossible to say that there had been any fruit exceeding the seed, and the labour; and yet it would be a very strong proposition to hold that the tenant could throw up a lease of that kind because the fruit had not exceeded the seed and the labour. Again, there might be land which might be allowed to run into sterility, and become unproductive by the fault of the tenant himself; there also the *dictum* would not apply.

But without pursuing the question with respect to agricultural leases further, I should doubt extremely whether *dicta* of this kind apply at all to leases of mineral subjects; for although we speak

(1) Inst. 3. 3. 5. Sir *George's* words are: "If the ground be absolutely barren, the hire will not be due; but if the land yield some profit, though never so little, the hire will be due if the profit exceed the expense of the seed and labouring."

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of a mineral lease, or a lease of mines, the contract is not, in reality, a lease at all in the sense in which we speak of an agricultural lease. There is no fruit; that is to say, there is no increase, there is no sowing or reaping in the ordinary sense of the term; and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and to take them away, just as if he had bought so much of the soil. It is very difficult to apply to a case of that kind *dicta* which evidently relate to the ordinary process of agriculture.

It is obvious that if these *dicta* were held to apply to mineral leases, the tenant, if he found his lease profitable, would continue to hold it and reap the profit from it; but if he found it unprofitable he would certainly give it up, and the loss would be not his, but the landlord's.

Again, my Lords, it would be impossible to apply these *dicta* to mineral leases without some knowledge of the area of time over which to spread the account of profit or of loss. I asked Mr. *Pearson*, who opened the case with great ability for the Appellant, to what time he would refer the question of the profit or loss, and I think he was obliged to admit that he would take the whole period covered by the lease (without counting the breaks) which in the present case would be a period of twenty-one years. Then I asked, how would it be possible at the end of the third or the fourth year of the lease, to speculate as to what the profit or loss would be if it were spread over the whole period of the lease. How can you at the end of the third or the fourth year of the lease tell what the price of labour may be in future years; or what machinery may be introduced in future, which may dispense to a certain extent with labour; or what the market value of minerals of the same kind will be at a future period, or what the effect upon the market value of those minerals may be of the discovery of other minerals of the same kind in the same neighbourhood. All those things are perfectly uncertain.

Then, my Lords, finding that there is no decided case which is an authority for the contention of the Appellant, and that there

are no *dicta* of institutional writers which can properly be applied to a case of this kind, I have no hesitation in saying that the Appellant has utterly failed to establish that there is in the case of a lease of this kind any implied warranty in law approaching to that express warranty which, in the first instance, he asserted had been given by his landlord. It is upon this ground that I should wish to rest the decision of the case. And I do so the more particularly for this reason, that I observe that some of the learned Judges in the Court below were rather inclined to rest it upon another ground, namely, to assume that there may be the common law right for which the Appellant contends; but that, on the other hand, that common law right is ousted by the express provisions contained in this lease with regard to breaks. If I found that there was a common law right such as has been alleged, I should have great hesitation in saying that anything in this lease did oust that right. If there is such a common law right, I do not see that it is in the least degree impossible that it should co-exist with a lease containing a provision for breaks. I do not, therefore, hold, that the common law right is excluded by the provisions of this lease, but rather that these provisions are to be regarded as a proof that it never was imagined by those who entered into it that there was any such common law right; because if there was such a common law right these provisions, to a great extent at all events, would have been unnecessary.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Appellant's Agent: *James Dodds.*
Respondents' Agents: *Grahames & Wardlaw.*

1873
March 10.

BUCHANAN OF DRUMPELLER AND HENDERSON & DIMMACK . . . . . } APPELLANTS;

ANDREW . . . . . RESPONDENT.

Contract—Obligation to submit to Mineral Workings.

10 Ch 460
10 QBD 358
56 L-L
Salt Co 84
843

A feu of land was granted reserving the subjacent minerals, and stipulating that the feuar should have no claim against the Superior or his tenants in respect of any damage that might arise from the working of the minerals. Damage having arisen, the feuar obtained from the Court of Session an interdict prohibiting the mineral workings complained of; but the House of Lords revoked the interdict—holding that the feuar had made a contract which bound him to submit to its consequences.

Per THE LORD CHANCELLOR:—This interdict imposes on the Superior an obligation which it was the express object of the contract to relieve him from. The fact that the contract was improvident cannot alter the construction of a special stipulation.

Per LORD CHELMSFORD:—It is the safest and best mode of construction to give to words free from ambiguity their plain and ordinary meaning.

IN the year 1847, Mr. *Buchanan* of *Drumpeller* granted to Mr. *Wilson* of *Dundyvan* a lease for nineteen years of certain valuable minerals, chiefly coal, lying mainly, if not wholly, under *Coatbridge*, a populous village in the Upper Ward of *Lanarkshire*.

It did not appear that during this lease any damage was done to the surface by the mineral workings of Mr. *Wilson*, or, after his death, of his testamentary trustees, and it was perhaps from this consideration that in 1859 *James Porteous*, a draper in *Coatbridge*, accepted a feu grant of land from Mr. *Buchanan*, *Porteous* becoming bound to build a house upon it, and to pay an annual feu duty. The grant reserved to the Superior all the minerals underneath, with a remarkable stipulation, assented to by the feuar, that the Superior should not be liable for any damage that might arise to the surface land feued or the buildings that might be erected thereon from working and carrying away the minerals underneath. In conformity with this feu contract *Porteous* built a house and made other erections on the land at an expense of about £900. In 1865 he sold the feu property with all its accompaniments to the above Respondent, Mr. *Andrew*, conveying it to him by dispo-

sition; "but excepting always and reserving to his Superior, Mr. *Buchanan*," the minerals underneath, with the right of working and carrying away the same in terms of the original feu to *Porteous*, and under the burdens, conditions, restrictions, limitations, and obligations specified therein.

The lease to Mr. *Wilson* having expired, a fresh lease of the minerals was granted by Mr. *Buchanan* to the Appellants, Messrs. *Henderson & Dimmack*, whose operations shortly afterwards gave rise to the present litigation—the Respondent, Mr. *Andrew* (the new feuar) asserting that by reason of the workings of the new mineral lessees, Messrs. *Henderson & Dimmack*, the walls, ceilings, and partitions of the feuar's house had been rent, and his boundary and parapet walls shaken; but adding that still greater damage would ensue unless the Court interposed. He therefore, on the 14th of March, 1867, presented his petition to the Sheriff of *Lanarkshire* praying that Messrs. *Henderson & Dimmack* might be ordered so to carry on their operations as not to injure or endanger the property of the feuar. Mr. *Buchanan*, the Superior, was called as a party "for any interest he might have in the premises."

The answer of the Superior and his lessees stated that by the feu contract all the minerals underneath were reserved with an express stipulation against liability for damage. The Sheriff ordered a proof; and upon advocation the Lord Ordinary (1) renewed the order for proof, which having been gone into voluminously before his Lordship, he, on the 26th of July, 1870, issued an interdict prohibiting the Appellants from working their minerals within one hundred yards of the feuar's property. His Lordship in a note remarked that

> The stipulations of the feu contract must be dealt with in subordination to its main object, viz., the erection and keeping up of a dwelling-house. It would be altogether unreasonable and absurd to suppose that while the feuar was to be bound not only to erect but always to uphold in good repair a dwelling-house, the Superior should be at liberty to destroy that house whenever he pleased, and that too without being answerable for the loss or damage thereby occasioned to the feuar.

The Appellants reclaimed against this judgment to the Inner House (Second Division), where, after much consideration, Lord *Cowan*, Lord *Benholme*, and Lord *Neaves* agreed with the Lord

(1) Lord *Ormidale*.

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Ordinary, but the Lord Justice Clerk *Moncrieff* dissented. The result was an adherence to the interlocutor complained of. Against this decision the Superior, Mr. *Buchanan*, and his lessees, Messrs. *Henderson & Dimmack*, appealed to the House, having for their counsel the *Lord Advocate* (1), the *Solicitor-General* (2), and Mr. *Traffer* of the Scotch Bar.

Sir *Richard Baggallay*, Q.C., and Mr. *Cotton*, Q.C., were heard for the Respondent.

The arguments of counsel are fully adverted to, and the facts of the case, and clauses in the instruments on which the parties rested, are amply set forth in the following opinions :—

THE LORD CHANCELLOR (3) :—

My Lords, generally speaking, when a man grants the surface of land, retaining the minerals, he is guilty of a wrongful act if he so uses his own right to obtain the minerals as to injure the surface, or the things upon it; and, as prevention is better than cure, the Court would be justified in granting an interdict to prevent him from doing so. But, on the other hand, I apprehend it is the clear law of *England* and also of *Scotland*, that when two persons meet and deliberately settle a contract, they are at liberty to enter into such terms (not being contrary to the public law), as they may think fit; and if a feuar of surface lands is willing to take the risk of any injury which may be done by the working of the subjacent minerals, it is perfectly lawful for him to do so; the person who was previously the owner of the entirety being under no antecedent obligation to part with any portion previously his own, except upon such terms as are mutually agreed upon.

In such a case, therefore, the whole matter resolves itself into a mere question of construction. No views of a conjectural kind as to what is, or what is not reasonable, can be admitted if the contract itself is plain and free from ambiguity.

In the neighbourhood of the property feued in this case there were several inhabited dwellings; and there were various seams of coal under it, of which the two upper seams had been already

(1) Mr. *Young*, Q.C. (2) Sir *George Jessel*, Q.C. (3) Lord *Selborne*.

worked out according to the old "stoop and room system," leaving thin and not very permanent walls to support the surface; the entire coal being taken out with the exception only of thin supports liable to decay and still more liable to fall in and break down, should any seams lying either immediately below or near them be, to any material extent, worked. That was the condition of the two upper seams, and there was below them a lower seam, which may or may not have been partially worked before the date of the lease of this particular property, but which appears to have been a seam of considerable value and thickness, and which, if it had been at that time worked at all, had been worked upon what is called the modern, or the improved stoop and room system. By that system more solid pillars are left as the coal is worked out; but when the coal has been taken out from the excavated spaces called "rooms," the mine owner comes back, and by degrees works out the whole of the pillars; so as to remove the entirety of the coal.

I may mention that the same effect would be produced if another known system, called the "long wall system," were adopted, according to which no supports are left at all in the course of the working, except such as may arise from the accidental accumulation of rubbish in the spaces from which coal has been taken out, and which rubbish, at all events under the circumstances of this mine, if left, would not be sufficient to prevent an extensive subsidence of sufficient importance to cause the injury which the interdict granted in this case was intended to obviate.

I will first consider what is the effect of that portion of the feu contract which expressly refers to the particular subject, and then whether there is any legitimate inference to be drawn from other portions of the contract so as to vary that interpretation.

The feu contract reserves to the Superior

> The whole coal, fossils, fireclay, ironstone, limestone, freestone, and all other metals and minerals, with full power to work, win, and away carry the same at pleasure, as also to remove as much stone and other matter as may be necessary for the proper working of the said coal, ironstone, and others, and that free of all or any damage which may be thereby occasioned to the feuar.

Now what would have been the effect if the words which I have last read, namely, "free of all or any damage which may be thereby

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occasioned to the feuar," had not been contained in the instrument? Without those words it would have been a mere reservation of the minerals, with full power to work, win, and away carry the same at pleasure, and also to remove as much stone and other matter as might be necessary for the proper working of the minerals. The effect of such a reservation, standing alone, according to the law of both countries, would have been that the whole property in the mineral strata would have been reserved to, and would have remained in, the previous owner, and he would have had an unlimited power of dealing with that as his own, but he would have been subject to the general restriction which every owner of property is under, expressed by the maxim, *sic utere tuo ut alienum non lædas.* Consequently, the interdict which has been granted by the Court below would have been right and proper had the matter rested there.

But then come in the words, "free of all or any damage which may be thereby occasioned to the feuar." It is very difficult to understand what these words can mean, except this, that to the full extent of that which is reserved, the working may take place, even though it occasions damage—for which the Superior is not to be responsible. The parties, appearing to have been anxious to make their meaning clear, go on to state that

> It is expressly agreed that the Superior shall not be liable for any damage that may happen to the said piece of ground, buildings thereon, or existing hereafter thereon, by or through the working of the coal, fireclay, ironstone, freestone, or other metals or minerals in or under the same, or in the neighbourhood thereof, by long-wall workings or otherwise, or which may arise from or through the setting or crushing of any coal-waste, or other excavation presently existing, or which may exist hereafter within or in the neighbourhood of the ground hereby disponed, through the said Superior working or draining the said metals or minerals, or others as aforesaid.

Your Lordships will see that this express agreement to exclude claims for damage is not confined to some particular description of damage, but it extends to any damage, the words being "and shall not be liable for any damage."

Secondly, the feu contract particularly takes notice of the buildings, and of the liability of those buildings to damage through the workings; and it says that the Superior shall not be liable for any damage which may happen to any buildings then upon the

property, or afterwards to be there. The importance of that reference to buildings will be seen presently, when we come to the latter part of the deed which relates to that particular subject. Thirdly, the feu contract takes notice of the modes of working by which such damage may happen, and puts foremost "long wall workings,"—a remarkable thing; because that was not the mode of working actually in use, or which ever had been in use there; and it was a mode of working which would completely extract, if it were followed, the whole of the coal without leaving any supports whatever, except such limited supports as might arise by rubbish left in the mine, and which, according to the evidence relating to this mine, would have been clearly insufficient to prevent damage by subsidence. I ought further to remark that the feu contract notices two kinds of damage: the one direct damage by the working of the seams remaining to be worked; and the other what I may describe as indirect damage by the subsiding of the wastes in the two seams already worked, in consequence of those excavations. The feu contract deals with the damage arising from the loss of lateral support occasioned by working in the neighbourhood, as well as with the damage arising from the loss of support occasioned by workings immediately under the surface in question. Can anything possibly be more clear, than that the intention of the parties on both sides was that the Superior was to have the unrestrained right of taking out the whole and every part of the reserved minerals, the whole risk of any consequent damage being undertaken and to be sustained by the feuar?

It has been suggested that the exclusion of damage may not exclude the right to an interdict. But, my Lords, I apprehend that a right to an interdict is founded only upon proof that the act is injurious and wrongful. Every act which is injurious and wrongful is an act for which there must be a liability to damages; and it is only, therefore, because it is such an act as would carry with it a liability to damage that the better remedy of interdict can be applied. The moment the damage is renounced it becomes a *damnum sine injuriâ*, and to a *damnum sine injuriâ* neither interdict nor action for damages applies. Therefore it appears to me to be as clear as possible, that the intention of the

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parties was, upon the one side to renounce all claim to compensation, and on the other to escape from any liability whatever for damage that might occur from excavating the entirety of the minerals.

But it is said that this construction may be limited by assuming a proper mode of working, and to that, if the word "proper" is rightly understood, I entirely agree. The Superior, in entering into this contract, only contracts for power to work and get the coal, and to be exonerated from any damage which may arise through the working of the coal. The very words "proper working" occur incidentally in one place, although not in the principal clauses in this part of the contract; but that only means that, if the Superior does that which is not needful or proper to the getting of the coal, and if the act so done leads to the subsidence of the surface, it is an act not within the scope or intention of this contract, and therefore the Superior is not protected by this clause in such a case. To let down the surface is not the thing which he contracts for; he contracts for power to work his reserved coal, and he is not to be answerable for damage by subsidence arising in that way. Wanton, reckless, or improper working, therefore, is a thing which is not in the view of either of the parties. If this working, which is prohibited by the interlocutor, were wanton, reckless, or improper, doubtless there is nothing here which would prevent it being interdicted. But is it so?

The question is, what is the meaning of "proper working?" I apprehend that the word "proper," has reference only to the subterraneous mineral-working—it has nothing whatever to do with the surface. The obligation to maintain the surface is independent of the right of working where it exists; and however proper the mode of working might be, if it let the surface down, and that was a thing which the mineral owner was not at liberty to do, the mineral owner would be answerable in damages for so doing. Of course there is a very intelligible sense of the phrase "proper working," which might refer to the upholding of the surface; but that, I apprehend, is not the sense in which it could be introduced into a contract which expressly stipulates that the mineral owner shall be exonerated from damage arising either to the surface or to the buildings upon it.

The construction which I am advising your Lordships to place upon this contract is exactly the same as that which Lord *Hatherley*, when Vice-Chancellor, placed upon a contract in this respect precisely similar. In *Williams* v. *Bagnall* (1) it was said, that you could possibly suggest some description of damage which might be provided against short of subsidence by ordinary workings. Lord *Hatherley* held that that was not consistent with the language of the contract, which expressly provided that the party was not to be liable for any damage. He said also, with regard to the suggestion of working so as to uphold the surface, that to introduce such a limitation would simply be to defeat the whole object of those stipulations.

Then, I say, if we rest on this portion of the contract, there really is no ambiguity and no uncertainty. The feuar has deliberately taken upon himself this risk, and this interdict imposes upon the Superior an obligation which it was the express object of the contract to relieve him from.

But then it is said that we find here what did not occur in the case of *Williams* v. *Bagnal*, or in any other case cited—namely, an express stipulation to build a dwelling-house of a certain description and value on the premises, and to maintain that house in repair, the building being erected according to a plan rather elaborately defined, the whole being an onerous obligation cast upon the feuar. It may seem that this was perhaps an improvident contract. But how can that fact alter the construction of an express stipulation, that the Superior shall be exonerated from all liability for damage arising from subsidence to any buildings that may thereafter be erected upon the property? One thing is quite plain, that although the feuar agreed with the Superior to erect buildings, both parties did contemplate that the buildings so erected might be damaged or destroyed by the mining operations of the Superior, in respect of which he was not to be responsible, and for which he was not to make compensation. Buildings being expressly in contemplation, it seems to me that that is quite enough, whether he contracts to build them himself, or is left at liberty to do it by contracting with another party. In *Williams* v. *Bagnal* it is clear that the land was sold as building land, and that buildings

(1) Weekly Notes, 15th December, 1866, p. 392. 12 Jur. N.S. 987
15 W.R. 272.

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were in contemplation. They were buildings, I think, of rather a more valuable kind than those which are in view here—namely, ironworks and machinery. But the Vice-Chancellor did not think that that circumstance prevented the parties from being capable of contracting that the whole risk of any damage by subsidence should be with the owner of the buildings, whatever were his obligations in respect of them, and that the mineral owner should have as free and unfettered a right to work out the whole of his minerals without being liable for any damage whatever, as he would have had if he had not granted the surface to any other person.

This, then, is the agreement which the parties have made, and in the latter portion of it there is not a single word which has a legitimate bearing upon the construction of the words which are to be found in the earlier clause which I have referred to; and, therefore, the interdict which has been granted is in truth an interdict relieving the feuar from his contract, without any action of reduction, or any cause that I can perceive, why he should be so relieved. Therefore, my Lords, the motion that I shall make to the House is, that these interlocutors be reversed, and the Appellant assoilzied from the conclusions of the action.

LORD CHELMSFORD:—

It is admitted that if the reservation is to be construed according to the ordinary meaning of language, there can be no restraint upon the right of the mineral proprietor to remove every particle of the coal under the piece of ground feued, though the inevitable consequence must be the total destruction of the feuar's dwelling-house. But it is contended by the feuar that, the object of the feu contract being to have a dwelling-house of a particular description built and maintained, the generality of the words of the reservation is to be restrained by reference to this object, and that the only proper working of the coal must be intended to be such as shall consist with an upholding of the surface and buildings.

This construction is maintained by the Judges who decided the case in the feuar's favour, on the assumption that the feuar would never have entered into a contract obliging him to build and

maintain a house which at any time might be destroyed by the exercise of rights belonging to the person who imposed the obligation upon him. Lord *Cowan* puts this very strongly. He says—

> Suppose it had been in express words stated that the Superior and his mineral tenants were to have full power at their pleasure to put the feuar's property into this certain peril, and it were asked whether the feuar would have entertained such an unreasonable and disastrous proposal, he certainly never would.

But, with great submission, this appears to me to be determining what has been done by a conjecture of what was likely to have been done. And then, in even stronger language, Lord *Cowan* says—

> It appears to me that the clause behoved to have in express terms provided that the feuar was to submit to have his property destroyed without redress should the Superior or his mineral tenants resort to the modern system of stoop and room working.

It is difficult to see in what more precise language the feuar could have submitted to this contingency than by agreeing to a reservation by which the whole of the coal is reserved to the proprietor, with full power to work, win, and away carry the same (*i.e.* the whole of the coal) at pleasure; it being expressly agreed that he shall not be liable for any damage that may happen to the piece of ground and buildings thereon by or through such working. Lord *Cowan*, in the passage which I have read, seems to consider that the destruction of the property will be the necessary consequence of resorting (as he calls it) to the modern system of stoop and room working. But this system seems to have superseded the former one (of course in cases only where there was no obligation to uphold the surface) at the time of the feu contract. *Porteous*, when he became the owner of the piece of ground, and Mr. *Andrew* at the date of the disposition from him, must be taken to have made themselves acquainted with the nature of the underground operations, and to have entered into their contracts with reference to them; and the modern system of stoop and room working was not resorted to after the feu contract, but was the mode of working in use at the time by *Wilson* and *Wilson's* trustees, and was continued by *Henderson* and *Dimmack* when they succeeded as the mineral tenants.

It cannot then be said that this, which was the ordinary mode,

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was not a proper mode of working, supposing the proprietor of the minerals had a right to get the whole of the coal, and was not bound to leave a support for the surface. Of course he must be liable for any damage which may happen to the surface from unskilful or negligent working; but I am at a loss to understand how working in the ordinary way upon an established system can be properly characterized (as it is by Lord *Benholme* (1)) as "a reckless mode of working."

Lord *Benholme* puts the propriety of the interdict upon a ground which it appears to me, with great respect, cannot be supported. He supposes the mineral proprietor to say—

> You must not look for any reparation in the shape of damages. If you were to attempt any such thing, the absolute clause in your feu contract would put you out of Court, and that is the reason why you shall not be allowed to protect yourself by interdict from the doing of the deed against the consequences of which you have no redress against me. Prevention is ever preferable to cure. But prevention becomes absolutely indispensable when the threatened injury admits of no redress.

What is this but to say to the person asking for the interdict: You have weakly and foolishly entered into an agreement whereby you have given to another person the liberty to do you damage without being answerable for it. We will interpose to protect you from the consequences of your folly by preventing that being done which you have agreed that the other party to the agreement shall have the right to do. This would be, if not to make a new contract, at least to annul the provisions of the existing one.

Lord *Neaves* (2), following Lord *Benholme's* view, holds that if it is demonstrable that the consequence of the mode of working would be a destruction of the surface, that would not be a proper working. And he adds that he cannot presume such to have been intended without words far more explicit than are contained in the clause of reservation. He even doubts whether a clause of this kind explicitly made could be enforced. No doubt of this nature, however, was expressed in the course of the argument. On the contrary, I put the case to the learned counsel for the Respondent of land feued with an obligation to build a house and keep it in repair, with a reservation to the Superior of the power to remove

(1) 3rd Series, vol. ix. p. 568. (2) 3rd Series, vol. ix. p. 569.

the house at any time if it interfered with the exercise of rights which he possessed. And he admitted that such an agreement would be perfectly valid. Indeed, to deny this would be to adopt the *dictum* of Lord *Denman* in *Hilton* v. *Lord Granville* (1), which was frequently doubted, and at last has been distinctly overruled.

Sir *Richard Baggallay*, in his clear and able argument, did not rely upon the improbability of the Respondent having entered into a contract which left him at the mercy of the mineral proprietor, nor deny that the words of the reservation, taken by themselves, would be sufficient to give the mineral proprietor the right to remove the whole of the coal from under the piece of ground in question; but he contended that the clause must be read in connection with, if not in subordination to, the object of the feu contract, which was to provide for the building and keeping up a house on the ground feued. And therefore he insisted that the words "the proper working of the coal" contained in the reservation must be construed with reference to this primary object of the contract. He endeavoured to shew that *Wilson's* trustees had worked so as to leave pillars as a support to the surface; and he therefore contended that if *Henderson* and *Dimmack* were removing these pillars they were not pursuing a proper mode of working.

But the operations of *Wilson's* trustees were not such as that described. On the contrary, it is proved that they were getting the coal on the modern stoop and room system, and accordingly in their forward working they had left large pillars; but they had commenced in working back to remove some of these pillars when their lease came to an end, and *Henderson* and *Dimmack* succeeded them.

If the Respondent is right in saying that under the reservation the working of the coal must be carried on with reference to the security of the building, then the mineral tenants must not come within one hundred yards of the dwelling-house, which the witnesses say would be a reasonable distance to ensure absolute safety, so that the mineral tenants would be deprived of a quantity of coal beyond the limits of the rood of ground feued to the Respondent.

The whole argument of the Respondent is involved in the

(1) 5 Ad. & E. (Q. B.) 701, Feb. 10, 1845.

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asserted restriction of the generality of the words of the reservation in order to render it subservient to the obligation to the feuar to build and maintain the dwelling-house. But this mode of dealing with the reservation seems to be adopted, although not avowedly, on account of the assumed impossibility of any person entering into a contract which it is taken for granted is a highly imprudent one, thereby resorting to conjecture instead of resting upon construction. For how can it properly be assumed that there is imprudence in the contract? It may have suited *Porteous's* purpose to become the owner of the piece of ground upon the agreed terms; or, assuming that his entering into such a contract was an act of imprudence, is that any reason why full effect should not be given to it?

It is the safest and best mode of construction upon all occasions to give to words free from ambiguity their plain and ordinary meaning. The case of *Williams* v. *Bagnal*, cited from the *Weekly Reporter* (1) and the *Weekly Notes* (2), approaches very nearly to this, because, although there was in that case no obligation on the Plaintiff, the purchaser, to build, yet it appears from the statement in the *Weekly Notes* that the grant was made to him for building purposes. The reservation of the minerals, with the power of working them without being answerable for any damage, was as large as in the present case. And the lessee of the minerals, having by his workings caused a subsidence of the land, the purchaser sought to restrain his further working on the ground that a grant of the surface included by implication of law everything necessary for its support, and that a man could not derogate from his own grant. But the Vice-Chancellor held that the implication of law was swept away by the express terms of the contract, which were plain, clear, and simple, and dismissed the bill with costs.

I cannot better conclude my view of the case than in the words of the Lord Justice Clerk: "I look on these obligations to the mineral owner as part of the consideration for the feu: and I can see no reason for permitting the feuar, while he retains the benefit, to repudiate the conditions of his right."

My Lords, I think the interlocutors appealed from ought to be reversed.

(1) Vol. xv. p. 272. 12 Jur. N.S. 987

(2) 1866, Dec. 10, p. 392. 12 Jur. N.S. 987.

LORD COLONSAY:—

Where there is a stipulation such as we have here, I think it is impossible to deny effect to it; and I cannot see how this effect can be given without rejecting the pleas of the Respondent.

The ground upon which the majority of the Court below proceeded was that the workings were not proper workings, because they produced the result that is complained of. I venture to think that that was a mode of reasoning in a circle. If the fact that they produced the injury is enough to determine the character of the workings as to whether they are proper workings or not, there is no effect given to the special stipulation, and there is no occasion for going further into any examination of the contract. I do not see in a case like this where the stipulation is express that it is possible to get over it.

I therefore concur in the judgment proposed by my noble and learned friend.

Interlocutors reversed with costs, and a direction to pay back expenses awarded by the Court below (1).

Appellants's Agent: *William Robertson.*
Respondent's Agents: *Grahames & Wardlaw.*

(1) The case as decided below is fully reported in the 3rd Series, vol. ix. p. 554.

ERRATUM.

In this case, p. 288, line 6 from top, *for* Mr. *Traiver*, *read* Mr. *Trayner*.

[1873] CUNO (The Wife) . . . . . Appellant;
May 13. CUNO (The Husband) . . . . . Respondent.

Nullity of Marriage—Impotence—Onus of Proof.

In a suit for declaration of nullity of marriage by reason of alleged impotence, the onus of proof is on the complainant.

Delay in applying to the Court.

The objection of delay in asking relief may be got over when the proof of impotence is complete; but not otherwise.

Strictness of the Court in interposing.

Per The Lord Chancellor (1):—To open the door to lax and easy declarations of matrimonial nullity would be a grave public mischief; and it is therefore imperative to proceed only upon strict and thoroughly satisfactory proof.

THE above parties intermarried on the 30th of December, 1863, and cohabited as husband and wife till the 28th of July, 1870, when they separated. On the 5th of July, 1871, the wife filed her petition in the Court for Divorce and Matrimonial Causes, praying a declaration that her marriage with the Respondent was null and void by reason of his impotence; the wife alleging that she herself was always "apt and willing to receive her husband's embraces; but that by reason of his impotence the marriage had never been consummated." The husband filed an answer on the 10th of July, 1871, denying the alleged impotence.

On the 25th of July, 1871, the Judge Ordinary (2) directed the Petition to be heard on oral evidence before himself, and made the usual order for the inspection of both parties by medical men.

The case came on for hearing on the 3rd of February, 1872; and at the close of the evidence the Judge Ordinary took time to consider of his decision. On the 2nd of March, 1872, he delivered judgment, observing that the burden of proof lay on the complainant, but that she had utterly failed in establishing her case; adding that "relief in suits of this kind is never accorded unless

(1) Lord *Selborne*. (2) Lord *Penzance*.

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the Petitioner is prompt in asking it, and sincere in the motive for doing so." The Petition of the wife was therefore dismissed; and as she had a separate income, she was ordered to pay the costs of the suit.(2)

Against this decision the wife appealed to the House; having for her counsel Dr. *Deane*, Q.C., and Dr. *Swabey;* at the close of whose address Mr. *Inderwick*, for the Respondent, was not called upon, the Law Peers delivering at once the following opinions:—

THE LORD CHANCELLOR:—

My Lords, in this painful case something has been said as to the effect upon the Appellant of a judgment unfavourable to her; but I think your Lordships will be of opinion that it would be a great error on the part of Judges to suffer their feelings of compassion to prevail over the principles which ought to govern them in dealing with this class of cases. To open the door to lax and easy declarations of matrimonial nullity would be a grave public mischief; and it is therefore imperative to proceed only upon strict and thoroughly satisfactory proof.

Now, the question between these parties is one of fact, known, as it appears, only to themselves. The learned Judge in the Court below has not held that the Appellant, upon whom the burden of proof entirely lay, has satisfied that burden; and it would therefore be necessary for your Lordships to see your way very clearly indeed before, upon the mere question of fact, you would differ from his Lordship.

There is here, it is admitted, no medical proof whatever.

That being so, your Lordships have only the oath against oath of the husband and wife, who directly contradict each other. Dr. *Swabey* has said, correctly I believe, that before the recent change in the law which admitted the evidence of parties themselves (1) the Appellant would have been simply out of Court. Now, my Lords, where you have nothing to rely upon but the evidence of the parties, directly contradicting each other, I think the House ought to be exceedingly cautious in deciding upon a mere balance

(1) 32 & 33 Vict. c. 68 (1869).

(2) Reported L.R. 2 P. & M. 414

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of probability. The *onus probandi* is upon the party seeking the declaration; and that *onus* ought to be strictly enforced.

We have here, moreover, a very considerable lapse of time, nearly eight years, before the proceedings are taken. Where there is conclusive evidence of the non-consummation of a marriage, which was the case in *Lewis* v. *Hayward* (1), lapse of time is a circumstance susceptible of explanation. But the lapse of time becomes a most material thing, in connection with the other circumstances, in the present case; and especially where you have to judge between the contradictory statements of the husband and the wife. I think, my Lords, that the effect of the lapse of time, in addition to the other facts, makes it impossible for your Lordships to come to a conclusion inconsistent with the judgment which has been pronounced by the very learned Judge, who appears most carefully to have weighed all the circumstances of the case. [His Lordship then proceeded to make some observations upon the evidence.]

Therefore, I am obliged to move your Lordships that this appeal be dismissed. Of course we need not mention costs.

LORD CHELMSFORD:—

I agree entirely with my noble and learned friend.

As to delay, my Lords, I am clearly of opinion that, however long continued, it can be no bar to a proceeding of this description, provided the case is clearly proved on the part of the person complaining. Nor do I think, even if the proceedings have emanated from some unworthy motive, that that would be an answer, supposing the case were clearly proved. But delay will frequently have, as it ought to have, considerable influence upon the judgment which ought to be formed upon the evidence adduced.

In the case of *Lewis* v. *Hayward* the proof was conclusive. But here the medical evidence fails entirely, and the other evidence is most unsatisfactory. Therefore, in my opinion, Lord *Penzance* was completely justified in coming to a conclusion adverse to the Appellant.

(1) 35 L. J. (N.S.) (P. & M.) 105, in the House of Lords, July, 1866.

Now your Lordships must remember that Lord *Penzance* upon this occasion was a judge of the fact, he was sitting almost as a jury, he had the witnesses before him, he had that advantage which we do not possess; he could judge by their demeanour what credit was to be given to their testimony. Under these circumstances, if I entertained a doubt as to whether Lord *Penzance* was right or wrong, I should hesitate before I should come to the contrary conclusion. I should not venture to do so unless I had the most complete conviction that Lord *Penzance* had drawn an improper conclusion from the evidence before him.

Under these circumstances I cannot hesitate to agree with my noble and learned friend that this decree must be affirmed.

LORD COLONSAY:—

My Lords, I am of the same opinion. I see no sufficient ground for reversing this judgment, and the subject is not an inviting one.

LORD CAIRNS:—

My Lords, I entirely concur.

Decree affirmed, and appeal dismissed.

Appellant's Agents: *Leathes & Maynard.*
Respondent's Agents: *Bothamleys & Freeman.*

1873 WATSON & COMPANY . . . . . APPELLANTS;
May 16. SHANKLAND *et al.* . . . . . RESPONDENTS.

Advances "against Freight"—Special Stipulation.

Where the charterers of a ship stipulate that they shall be entitled to insure their advances "against freight," at the owner's expense, and where they fail to insure, they have, in the event of the ship perishing, no claim against the owners for repayment.

Repayment of Advances for Freight—General Law.

Per THE LORD CHANCELLOR:—It does not appear to me that in this case we ought to decide any question of general law.

IN October 1863, a charterparty, entered into with the master of a ship belonging to the Respondents who are merchants in *Greenock*, was indorsed to the Appellants, who are merchants in *Calcutta*. The vessel, then lying at *Calcutta*, was to proceed with her cargo to "a safe port in the *United Kingdom*;" the Appellants, as charterers, being bound by the words of the charterparty to the following obligation:—

Sufficient cash for ship's ordinary disbursements to be advanced the master against freight; subject to interest, insurance, and 2½ per cent. commission; and the master to indorse the amount so advanced upon his bills of lading.

Having received a copy of this charterparty, the owners at *Greenock* effected an insurance of freight; deducting what they thought would be the disbursements at *Calcutta*, which, from the terms of the charterparty, they expected would be insured by the charterers.

While the master at *Calcutta* was preparing for the voyage, the charterers, as arranged, made advances to meet his requirements; and he granted them a bill for the amount (£500); which bill was drawn on the owners, and presented to them at *Greenock*, on the 17th of December, 1863; but they refused to accept it, holding that under the charterparty the charterers ought to have effected an insurance for the amount of their advance; but this they had neglected or omitted to do.

The ship, on her voyage to this country, was totally lost, with

her cargo, on the 7th of April, 1864. And on the 27th of October, 1865, the present action was commenced by the charterers against the owners to recover back their disbursements. The owners having put in their defence, the case came before the Sheriff Substitute of *Renfrewshire* (1), who, on the 19th of December, 1870, assoilzied the owners, allowing them also their expenses. The Principal Sheriff (2), however, reversed the decision of the Sheriff Substitute (3).

The owners appealed to the First Division of the Court of Session, who, after argument, appointed the case to be re-argued before them, along with three Judges of the Second Division. In accordance with the opinions of a majority of seven Judges, the First Division decided, on the 2nd of December, 1871, against the charterers; reversing the interlocutor of the Sheriff Principal; finding that the charterers had failed to effect any insurance in respect of their advances against freight; and consequently ruling that the charterers had not established their claim of repayment or repetition against the owners. There were other findings, which are specially adverted to by the Lord Chancellor.

Against this judgment of the Court of Session the charterers appealed to the House of Lords; having for their counsel Mr. *Butt*, Q.C., and Mr. *F. M. White*, who contended that the freight not having been earned, payment back of the charterer's advances was, by the law of *Scotland*, clearly demandable; and there was nothing in the contract between the parties inconsistent with the general rule of law.

The *Lord Advocate* (4), and Mr. *Benjamin*, Q.C., on the other side, maintained that it was the duty of the charterers to effect the stipulated insurance, which would have enabled them to proceed against the underwriters, as laid down by Mr. Justice *Willes* in *Trayes* v. *Worms* (5). The charterers, having failed in this respect, were not entitled to recover from the owners.

(1) Mr. *H. L. Tennent.*

(2) Mr. *Fraser.*

(3) See Mr. *Fraser's* learned note (3rd Ser. vol. x. p. 144) shewing that the question raised was new in *Scotland*, and that the English decisions were opposed to the rules of foreign countries.

(4) Mr. *Young*, Q.C.

(5) 34 L. J. (C. P.) 274. 11 Jur. N. S. 639

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The following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (1):—

My Lords, the true construction of this contract may be that the advance was to be a loan upon the security of the freight, and not a pre-payment of freight. It is not necessary that your Lordships should decide that question; and I should not advise your Lordships to pass your decision in such a form as to affect the future determination of such a question, should it arise. But, assuming that this was to be a loan upon the security of the freight, and not a pre-payment of the freight, or a part payment of the freight, or a payment on account of the freight, within the principle of the authorities which have been referred to,—still the question is whether, according to the true and sound construction of this contract, it was not understood and agreed between the two parties that the insurance, which it was for the interest of both to have made in the most proper and convenient manner, should be made by the charterers.

Apart, my Lords, from any evidence as to usage, I cannot but think that it is a sound view of this mercantile contract to hold that it provides for insurance, and does not leave the subject of insurance uncertain and indeterminate. Insurance is mentioned, as your Lordships will observe, in direct connection with two other things, which were not uncertain, and which were not indeterminate, namely, interest and commission. Interest was to be charged at all events; commission was to be charged at all events. It appears to me that there is nothing to lead us to suppose that insurance was not to be as much a fixed term of the contract as interest and commission; and that not the less because all these terms are primarily in favour of and for the protection of the person advancing the money. The shipowners subject themselves to the burden, but both parties have an interest in diminishing that burden. And therefore, as either one or the other ought to make an insurance, it was reasonable that they should make a contract between themselves as to how the insurance was to be effected.

(1) Lord *Selborne.*

One of your Lordships put to Mr. *Butt* this observation, in which Mr. *Butt* expressed his concurrence, that "these are all things as to which the charterers were to be creditors of the other party." But if the charterers were to be the creditors of the other party for all these things, then that was a part of the contract. The charterers were to advance the money, they were to charge interest, they were to charge commission, and they were to charge insurance, and how could they charge insurance unless insurance were effected?

The good sense of the matter concurs with that view; because the charterers would not be satisfied unless the insurance was under their own control; a control for which it was reasonable that they should stipulate; and it would be only by them, when the advances were made, that the precise amount for which the insurance was to be effected would be known. I take it, therefore, that as between these parties it is a contract in substance to this effect: "I, the borrower, give you, the lender, a right to charge me with the premium of insurance;" which is very much the same thing in principle as if the borrower had put the money into his hands for the purpose of effecting that insurance. I by no means think it necessary to say what the result might have been if for any reasonable cause he had determined not to avail himself of the right to insure and to charge the premiums of insurance, and had given notice of that to the other party in reasonable time. The charterers here did not, in fact, do so; although, according to the evidence, there was abundance of time for them to do so. Still less do I desire to say anything which would affect the question which might have arisen, if having effected an insurance, that insurance had, through some cause not imputable to the charterers, become unavailable. I proceed, my Lords, upon the assumption, that it may be the construction of this contract, that in either of these events the charterers, acting reasonably and according to good faith, would be held entitled to recover in the event of the loss of the ship.

The question is, whether under this contract the shipowners had not a right to rely upon that insurance being made by the charterers, who here stipulated for and received the right to charge the premiums. I think the shipowners had this right.

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The charterers neglected to insure, and neglected to give notice of the non-insurance. What must be the consequence of a loss of the ship, the charterers knowing that the insurance was not effected? Upon one or the other of these two parties that loss must fall. If the insurance had been made, and the money paid by the shipowners, then the benefit of the insurance would have accrued to the shipowners. It is very much like the right of a man who gives several securities, when he pays off the mortgagee, to have all the securities delivered up into his own hands, unless a reason, which is a sound and good one, and consistent with the duty of the mortgagee, and which is not imputable to his own fault, can be given for the failure of any one of them. This seems to have been really the view which prevailed, on the whole, in the minds of the learned Judges in the Court below; and I think the soundest course for your Lordships to take will be to found your judgment entirely upon that view.

But in the interlocutor under appeal there are certain findings which your Lordships will probably think go beyond the requirements of the present case. There is a finding as to the general law upon the subject. Now I do not think it expedient that that finding should be retained; first, because it does not appear to me that upon this occasion we ought to decide any question of general law at all; and, secondly, because if we did it would be necessary to consider how far that law ought to be the English or the Scotch law; and, finally, if it ought to be the English, whether it would be a safe thing to lay down the rule in the terms which are here stated—terms which certainly do not agree with the rule lately stated in the English case of *Byrne* v. *Schiller* (1). I should

(1) In *Byrne* v. *Schiller* (Law Rep. 6 Ex. p. 325) Lord Chief Justice *Cockburn* made the following remark: "It is settled that by the law of *England* a payment made in advance on account of freight cannot be recovered back in the event of the goods being lost, and the freight therefore not becoming payable. I regret that the law is so. I think it is founded on an erroneous principle; and I am emboldened to say this by finding that the American authorities have settled the law upon directly opposite principles, and that the law of every European country is in conformity with the American doctrine, and contrary to ours." The Law of *England*, thus described by Lord Chief Justice *Cockburn*, has been in force since 1683, when it was ruled by Chief Justice *Saunders*, at a *Guildhall* trial, That "advances, paid before in part of freight, cannot be recovered back although the ship be lost before coming to a delivery port" (2 Shower, p. 283).

therefore propose to your Lordships to vary the interlocutor appealed from by omitting the following words:

Find in law that cash advanced against freight to the master of a ship by the charterers for ordinary ship's disbursements at the port of loading is not in ordinary circumstances equivalent to a payment of freight, but is to be held as an advance in consideration of the subsequent performance of the contract by the owners and shipmaster by the right delivery of the cargo at the port of discharge; and that if there is a failure of the consideration by the voyage not being accomplished and the cargo rightly delivered at the port of discharge, the charterers are entitled, in respect of such failure of consideration, to recover the amount of the said advance from the owners.

The Court below further propose to put a construction upon the contract going beyond the view which I have submitted to your Lordships, the interlocutor appealed from containing these words:

That the charterers having stipulated that they should be entitled to insure freight at the owner's expense, must be held to have limited their security for repayment of the advances to the right of set-off in settling with the owners if the freight should be earned; and to the amount of the said insurance if ship and cargo should be lost; and to have relinquished or discharged the personal obligation of the owners for repayment in the latter event.

I cannot think, my Lords, that we are called upon to leave such an interpretation of the contract upon the face of the interlocutor. One of your Lordships has suggested words to be substituted for for those which I have read, words which would make the finding run thus:

Find, that in the present case the charterers having stipulated that they should be entitled to insure freight at the owner's expense to an amount corresponding to the amount of their advances, must be held to have made such insurance a part of their security, and, not having effected any such insurance, must be held to have relinquished, in the event of the ship being lost, any claim against the owners for repayment.

I would submit to your Lordships that these words should be adopted, and that the interlocutor should be varied in the manner I have suggested.

LORD CHELMSFORD:—

My Lords, I agree with my noble and learned friend. By the contract between the parties the insurance upon the advances was to be effected by the charterers. There was no obligation upon them to insure except for their own protection; but, as they

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chose not to insure, they took the risk upon themselves, and therefore they must bear the loss.

LORD COLONSAY :—

My Lords, I concur in the result which has been arrived at; and I think the grounds which have been stated are quite sufficient for the determining of this case.

LORD CAIRNS :—

My Lords, I also concur.

Interlocutor appealed from affirmed with variation, and cause remitted.

Appellant's Agents: *Hillier, Fenwick, & Stibbard.*
Respondent's Agents: *Simson, Wakeford, & Simson.*

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May 9.

MACKINTOSH . . . . . APPELLANT;
MACKINTOSH *et al*. . . . . RESPONDENTS.

Widow's Provision—Heir of Entail relieved.

Case in which it was held by the House, reversing the judgment appealed from, that an heir of entail was entitled to be relieved from the provisions in favour of the widow of the testator—the maker of the entail :—

Per LORD COLONSAY :—The purpose was that the estate should be launched under the entail free from debt, and that the widow's provision should be satisfied out of the testator's general property, which was ample.

THIS "Special Case" was presented to the Court of Session by the Appellant and the Respondents concurrently under the Act of 1868 (1); to obtain a judgment upon the question whether certain annuities payable to a testator's widow should fall upon his entailed estate, or on his general property. The decision appealed

(1) 31 & 32 Vict. c. 100, s. 63, providing that where parties shall be agreed upon facts, and shall dispute only the law, they may without any action or proceeding present at once a Special Case for the opinion of the Court; the judgment, however, to be subject to review by the House of Lords, unless excluded by consent.

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from fixed the charge on the entailed estate, relieving the general property. Against this judgment the heir of entail, the testator's eldest son, appealed to the House; having for his counsel the *Lord Advocate* (1), and Mr. *Asher*, of the Scotch Bar.

The *Dean of Faculty* (2), and Mr. *Pearson*, Q.C., were heard for the Respondents.

The judgment of the House was proposed by Lord *Colonsay* in the following address:—

LORD COLONSAY:—

My Lords, in this case the Court of Session has decided that the heir of entail is not entitled to the relief he asks. That decision is rested mainly on two grounds: First, that by the law of *Scotland*, as a general rule, a liferent annuity, or a debt secured on heritable estate, is to be borne by the heir succeeding to the heritage in the case of intestate succession, and that the same rule holds in the case of testate succession, unless a contrary intention is made to appear. The second ground on which the decision of the Court of Session rests is, that the clause in the entail on which the heir founds cannot in the circumstances be understood as applying to the particular annuities in question.

The first of these propositions is admitted as a general rule; but the Appellant contends that a contrary intention is here made to appear. The second proposition is disputed.

The late *James Mackintosh* of *Lamancha*, left, first, a deed of entail of the estate of *Lamancha*, dated in 1857; secondly, his last will and settlement dated in 1865; and thirdly, his contract of marriage with his third wife, dated in 1867.

The first of these deeds—the deed of entail—contains the clause on which the heir of entail mainly founds, and which is thus expressed: "I oblige myself, my heirs, executors, and representatives whatsoever, to free and relieve my lands before disponed of all my debts and obligations." The second of the said deeds—the will and settlement—conveyed his whole estates, heritable and moveable, other than the estate of *Lamancha*, to certain trustees, and directed

(1) Mr. *Young*, Q.C. (2) Mr. *Gordon*, Q.C.

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them to pay "the whole debts which might be due by him at the period of his death," and also to pay certain legacies and bequests, and to divide the residue into six shares, to be distributed in certain proportions among his four children, all of whom were by his first wife (1). The will and settlement also contained a clause revoking "all wills and settlements executed by him at any time theretofore, excepting the deed of entail, which should stand and subsist in full force and effect." The third of the said deeds—the contract of marriage—made certain provisions in favour of his third wife, including two annuities of £150 and £70, now in question, and for "her further security and more sure payment" of the said annuities he bound and obliged himself to infeft her in the estate of *Lamancha*. This deed also contains the following clause, on which the heir of entail founds:—

> But declaring that it shall be in the option and power of the said *James Mackintosh*, and his heirs, executors, and successors, to secure the said annuity of £150 and yearly sum of £70 to the said *Mary Ann Burn* (his third wife) by purchasing at his and their own expense from any respectable insurance company, to be selected and approved of by her, an annuity payable to her in the terms before provided, equal in amount to the said annuity of £150 and yearly sum of £70 hereinbefore provided to her; and upon the purchase being effected and completed to her satisfaction, and the writs securing the same being delivered to her, she binds herself and the trustees after named, to discharge and disburden the several subjects and others before mentioned and described of the said provisions secured over them as aforesaid.

In January 1867 Mrs. *Mackintosh* was infeft in the estate of *Lamancha* on the contract of marriage. In February, 1869, Mr. *Mackintosh* died without having exercised the option provided by the contract of marriage.

The rental of the entailed estate was about £700 per annum; while the public, parochial, and other burdens payable by the proprietor amounted to about £100 per annum. The general trust estate comprehended a house in *Charlotte Square, Edinburgh*, heritable and personal estate in *Calcutta* of considerable amount, and personal estate in *Britain* exceeding £27,000, and it appears that the two-sixths of his estate falling to the share of each of his daughters will be "more than £10,000 and less than £20,000."

The heir of entail now claims to be relieved of the annuities by

(1) The Testator had married thrice; and was survived by his third wife.

the general trust estate. I am of opinion that he is entitled to be so relieved.

The clause in the entail was certainly intended to impose an obligation somewhere to free and relieve the estate of *Lamancha* of all Mr. *Mackintosh's* debts and obligations, and I have no doubt that it was meant to extend to future debts and obligations. The words are quite general, and the Judges in the Court below appear not to have attached importance to the circumstance, that the obligation in question was contracted at a date subsequent to the entail (1). Indeed it does not appear, and is not alleged, that at the date of the entail there existed any debt or obligation, and if there was none, the clause must have been intended to apply to future debts and obligations. The purpose of it appears to have been that the estate of *Lamancha* should be launched under the entail free from debt; and the conception of the clause appears to have been, not with the view of effect being given to the ordinary rule of law as between heir and executor, but with the view of making a special arrangement because of the entail. The ordinary rule of law as between heir and executor in regard to the incidence of debts is founded on the presumption that the heritage is capable of bearing all the burdens incident to it. The heir who succeeds to it, if he is not fettered, can deal with it as he pleases, and turn it to the best account for his own relief. But if he is only to be put into possession under the fetters of an entail, his condition will be materially different, and if the entailer intends that the estate he is entailing shall be started free from debt, it is quite reasonable that he should make provision for doing so out of his other means, and the more so if his other means are ample, as in this case they are said to have been.

The obligation to free and relieve *Lamancha* was imposed by the entailer on himself, his heirs, executors, and representatives whatsoever. That appears to have been with him a primary or leading object. If he had himself redeemed the obligation, he must have done so out of his general estate, which would have been to that extent diminished. Not having done so, on what part of his estate did he intend that the obligation to relieve should devolve? It could not be on the estate of *Lamancha*, because that was the estate to be relieved. His only other estate was the general estate,

(1) See a very full report of the case, 3rd Series, vol. viii., p. 627.

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therefore, if the relief was to be given by him or by his estate, it was to be given out of his general estate.

It appears to me that this view is supported by the terms of the trust settlement. It is true that in the general case a direction to to trustees in a *mortis causâ* trust deed to pay the debts of the deceased does not of itself imply any deviation from the general rule of law as to the incidence of heritable and movable debts. But an expressed intention to start an incipient entail, or to add other lands to an existing entail, introduces another element, and gives rise to other considerations, leading to the inference that the testator intended the lands so dealt with to be cleared of debt, even if there was no express declaration to that effect, as the continued existence of debt on these lands might result in defeating the object of the entail.

Here there is the declaration, or rather obligation, of the testator himself in the deed of entail, which is referred to in the trust deed as forming part of his settlements, and he directs his trustees to pay all his debts, to record the entail, and to put the heir into possession of *Lamancha* under and in virtue of the deed of entail.

Taking these two deeds together, I do not doubt that Mr. *Mackintosh's* intention was that the estate of *Lamancha* should be freed and relieved out of his general estate, unless there are special grounds for holding that the particular annuities in question are not within the range of the debts and obligations to which the clause in the entail has reference.

Up to the time when the trust settlement was executed there did not, so far as we see, exist any debt that would have affected *Lamancha* according to the ordinary rule of law as between heir and executor. But then came the marriage contract, by which a security over *Lamancha* was given to the lady for the annuities in question; and by the same deed Mr. *Mackintosh* reserved to himself, his heirs, executors, and successors, the option and power to purchase for the lady from any respectable insurance company, to be approved of by her, an annuity equal to those in question, and she bound herself thereupon to discharge the security over *Lamancha*, and disburden that estate thereof.

Upon this deed several observations have been made: First, it has been observed that the burden imposed was subsequent to the date of the entail. I have already shewn that this circumstance is

immaterial, and may be dismissed. Secondly, an observation to which some importance appears to have been attached in the Court below was, that, as Mr. *Mackintosh* was wealthy and could have provided for his widow otherwise, it is difficult to understand why he should have imposed the burden on the entailed estate if he intended it to be borne by his general estate. I am not much moved by that observation. It may be that Mr. *Mackintosh* could have provided for his widow by placing funds in the hands of trustees for that purpose, or by coming under obligation to do so, or to provide her with a jointure. But we do not know how his funds were employed at that time. He may not have been disposed to disturb his investments, or to lock up funds in the hands of trustees. The lady or her advisers may have preferred immediate substantial security over *Lamancha* to an obligation *de futuro* to be implemented out of floating capital. Thirdly, it was contended, and that appears to have been the main ground of judgment in the Court below, that the annuities secured over *Lamancha* are not a debt, or at least are not a debt in the sense of the clause in the entail; that they are not a capital sum due which might be at once paid off, but are a continuous security over the rents for the termly annuities as they fall due, and similar to the right which the present or future heirs of entail would have to make provision for their widows under the *Aberdeen Act* (1), or under the powers given by the entail, which are similar to those of the *Aberdeen Act*. I am not satisfied with that view. The clause of relief in the entail applies to "all my debts and obligations." I am of opinion that these annuities constitute a debt in the ordinary sense of the word. They are a debt in which the widow is the creditor, and the representatives of Mr. *Mackintosh* are the debtors, and for payment of which the estate of *Lamancha* may be attached unless the relief sought be given. But whatever ingenious criticism may be made on the word "debts" it is impossible to escape the generality of the word "obligations." Neither can the obligation be assimilated to a provision under the *Aberdeen Act*. It does not profess to be anything of the kind. It has none of the requisite conditions or limitations as to amount or

(1) 5 Geo. 4, c. 87 (1824), authorizing provisions to widows and children out of entailed estates.

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liability or mode of recovery. The only similarity is, that it is a provision for a widow. Nor does the circumstance that it is an obligation for an annuity, and not for a capital sum, appear to me to raise any practical difficulty. The clause in the marriage contract provides for and sufficiently meets any difficulty of that kind that might have been raised. It reserves the power to relieve the lands, and prescribes the mode. The only question is as to the incidence of the obligation, and I would here again observe that at the very moment of imposing the burden on *Lamancha* Mr. *Mackintosh* had in contemplation the removal of it by himself or his representatives, and must have intended the relief to come, not out of *Lamancha*, but out of his other means, that is to say, out of the general estate. The Respondents say that they cannot purchase an annuity, as no direct power to do so is conferred on them by the trust deed. But if I am right in holding that the clause of relief in the entail was intended to attach to the general estate, it follows that the power reserved in the marriage contract may be exercised by the Respondents as the trustees of that estate. They also say that they have no interest in purchasing an annuity, which would be an expensive proceeding. The same observation would apply to the Appellant. But if the obligation to relieve *Lamancha* has devolved on the general estate, the Respondents must give the relief in the mode provided, unless they can find a less expensive and equally effectual mode of doing so.

For these reasons I am of opinion that the interlocutor of the Court of Session should be reversed. If your Lordships concur in the view that I have expressed it may be proper to remit the cause back to the Court below; because a decerniture may be required upon which proceedings may be taken.

LORD CHELMSFORD:—My Lords, I agree in the motion that has been made.

The *Lord Advocate*:—I presume your Lordships have intentionally abstained from saying anything about costs.

LORD COLONSAY:—Yes.

Reversal and Remit.

Appellant's Agents: *Tatham & Procter.*
Respondents' Agents: *Loch & Maclaurin.*

WILLIAM R. D. S. GLENDONWYN, Esq. . Appellant;
SIR ROBERT GORDON, Bart. . . . . Respondent.

1873
May 19.

Presumption against Change of Destination.

Per Lord Colonsay :—The rule of Scotch law in regard to heritable property is, that a destination once made is not easily presumed to have been altered or innovated.

Words of General Disposition.

Per Lord Colonsay :—In determining what effect should be given to words of general disposition, the question has always been treated as one of presumption or presumed intention.

Extrinsic Evidence of Intention.

Per Lord Colonsay :—The Court takes into consideration circumstances calculated to throw light on the intention, whether found in the deed or collected from external circumstances.

Per The Lord Chancellor :—I am bound to acknowledge that evidence of this kind appears to have been received, and to have been more or less relied upon, in two Scotch cases which came before this House in Lord *Hardwicke's* time.

By deed of entail, dated the 25th of March, 1821, the late Mr. *Frederick Maxwell* conveyed the estate of *Cowgarth* to Miss *Xaveria Glendonwyn*, "and the heirs whatsoever of her body." There followed ulterior destinations with the usual fettering clauses; and one question was, whether these fettering clauses applied to Miss *Glendonwyn*, she having been the institute, and not one of the heirs, in the entail.

On the 22nd of February, 1834, Miss *Glendonwyn* made a disposition in favour of her nephew, giving to him and his heirs and assigns "all lands and heritages of whatever nature or denomination then belonging to her, or which should belong to her at her death." She died on the 4th of October, 1858, survived by her said nephew, who, himself dying in 1860, was succeeded by his only child and sole heir the above Appellant.

It appeared that on the death of Miss *Glendonwyn* the Appellant's father took no steps for establishing his right to the *Cowgarth* estate under her disposition of 1834. But under the deed of 1821 the above Respondent, Sir *Robert Gordon*, took possession as heir of entail.

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GLENDONWYN v. GORDON.

The present action was therefore commenced by the Appellant against Sir *Robert Gordon* to have it declared that the fettering clauses of the entail were not directed against Miss *Glendonwyn;* that the *Cowgarth* estate was effectually conveyed by her disposition of 1834; and that it consequently belonged to the Appellant.

The defence of Sir *Robert Gordon* was, in the first place, that the fetters of the entail *did* apply to Miss *Glendonwyn*, and barred her conveyance of the *Cowgarth* estate; and, secondly, that she did not intend to convey, and did not really convey it by her disposition of 1834.

The Lord Ordinary (1) held that the entail did *not* apply to Miss *Glendonwyn*, and that there were no facts "relevant and sufficient to establish that it was not her intention to convey the *Cowgarth* estate to the father of the Appellant by her disposition of 1834."

In so ruling the Lord Ordinary relied on the case of *John Thoms* v. *Robina Thoms* (2), decided by the Court of Session in 1868, wherein it was held that an institute of entail, to whom the fetters did not apply, having made up titles and possessed until his death under the entail, and having, nevertheless, left a general disposition conveying all his estates heritable and moveable to a natural daughter, she was, under the general disposition, entitled to the entailed estate.

Against the Lord Ordinary's judgment Sir *Robert Gordon* reclaimed; and on the 9th of July, 1870, the First Division recalled his interlocutor and decided that Miss *Glendonwyn*'s disposition of 1834 "was not intended to convey, and did not effectually convey, the entailed estate to the disponee named therein." The reasoning on which the learned Judges arrived at this conclusion is very fully set out in the Third Series of the Scotch Reports (3).

On the appeal to the House the *Solicitor-General* (4) and Mr. *Pearson*, Q.C., were counsel for the Appellant, and contended that the fetters of the entail were not directed against Miss *Glendonwyn;* that her disposition of 1834 effectually conveyed the *Cowgarth* estate; and that it was incompetent to resort to

(1) Lord *Jerviswoode.*
(2) 3rd Series, vol. vi. p. 704.
(3) Vol. viii. p. 1075.
(4) Sir *George Jessel*, Q.C.

extraneous evidence to shew an intention on her part differing from that evinced by her settlement.

The *Lord Advocate* (1) and Mr. *Asher*, of the Scotch Bar, having been heard for Sir *Robert Gordon*, the Respondent, the following opinions were delivered by the Law Peers.

THE LORD COLONSAY :—

My Lords, ever since the case of *Edmondstone* v. *Edmondstone* (2), which was decided by this House in 1771, it has been held as settled that where the fettering clauses in a strict entail are directed against the *heirs of entail* merely, those terms do not include the institute, as he is a disponee and not an heir of entail, and ought not by implication from other parts of the deed to be construed within the fetters laid only on the heirs of entail. In the present case, the fetters, that is to say the prohibitory, irritant, and resolutive clauses, are in terms laid on the "heirs of entail and substitutes" only; and, consequently, the rule established in the case of *Edmondstone* applies.

It is true that in other parts of the deed of entail in the present case we find such expressions as "the said *Xaveria Glendonwyn* and the *other* heirs of tailzie above named," as well as "and the *other* heirs and substitutes above mentioned," from which it has been argued that she was to be regarded as one of the heirs of entail. But in the first place, the clauses referred to are not any of the fettering clauses; they are merely part of the machinery provided for enabling any of the parties favoured by the deed to take infeftment; and, in the second place, to hold that such loose expressions could have the effect of converting the institute, who is a direct disponee, into an heir of entail or substitute, or of extending to her, by inference, the fetters which, according to the terms of the fettering clauses themselves, apply only to the heirs of entail or substitutes, would be to do violence to the principle of *Edmondstone* v. *Edmondstone*, and of several cases subsequently decided.

The Respondent's defence assumes that *Xaveria* was not under the fetters of the entail, and consequently had full power over the estate of *Cowgarth*, and could give it to whom she pleased.

(1) Mr. *Young*, Q.C. (2) Morr. 4409; 2 Pat. 255.

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Did she, by the general words in her settlement of 1834, give to *Frederick James Scott* a right to that estate to the exclusion of the heir of the existing destination in the deed of entail by which she, as institute, got and held the estate? Was that destination thereby evacuated and the estate of *Cowgarth* put into a different line of descent? That depends on the effect to be given to a clause of general disposition occurring in such a deed of settlement when brought into competition with an earlier deed containing a special destination of a particular estate, and that again may depend more or less on the circumstances of the case; the rule of the law of *Scotland* in regard to heritable property being that a destination once made is not easily presumed to have been altered or innovated.

There are two classes of cases in which the question may arise; one class of cases is where a person having made a deed containing a special destination of a particular estate, or having chosen to take a conveyance of an estate to himself with a special destination, makes a disposition and settlement in general terms of his whole means and estate heritable and moveable with a different destination, but without expressly revoking or altering the first deed, or making mention of it, or of the estate with which it dealt. Of this class there are several cases reported, mostly under the head "Presumption," some of which are referred to in the papers in this case. I think that out of the whole series reported during the last two centuries or more, the following inferences are deducible: First. That in determining what effect should be given to words of general disposition, the question has always been treated as one of presumption or presumed intention. Second. That a general disposition *mortis causâ* does not derogate from a prior special destination unless it be made clear that it was intended so to do. Third. That in dealing with such cases, the Court has taken into consideration circumstances calculated to throw light on the intention or purpose of the testator, whether found in the deed or collected from external sources.

The fact of the prior deed having been found in the repositories of the deceased without having been expressly revoked or altered, may be regarded as favouring a presumption that, although the general disposition was expressed in terms which, according to their natural and ordinary meaning, would comprehend the particular

property which formed the subject of the prior deed, such was not the purpose for which they were used, or the effect the testator intended should be given to them, but on the contrary, that notwithstanding the unlimited terms of the later general disposition his intention was that the prior deed should, nevertheless, subsist and be taken as part of his settlement. But it does not appear that the attention of the Court was confined to that view as necessarily conclusive, or that external circumstances were excluded from consideration for the purpose of rebutting or supporting the legal presumption that the general disposition was not intended to derogate from the prior destination.

Another class of cases is that to which the present may be said to belong, viz.: where the person who made the general disposition was not the maker of the prior special destination of the particular estate, but had unlimited power to evacuate the special destination and deal with the estate at pleasure. In this class, also, the cases that have occurred have been treated as raising questions of presumption, or presumed intention. There has, indeed, of late, been difference of opinion as to whether the mere existence of the previous destination unaltered does, without aid from other circumstances, raise in this class of cases a presumption that the general words were not intended to apply to the particular estate so previously destined. But there does not appear ever to have been any difference of opinion as to the competency of resorting to external circumstances, going to shew that the general disposition, notwithstanding the comprehensiveness of its language, was not meant or intended to displace the prior special destination.

In the case of *Campbell* v. *Campbell*, decided in the Court of Session in 1740, and in the House of Lords in 1743 (1), two questions were raised. Both are reported in the second volume of Lord *Kames*' remarkable decisions (2), but under different heads; one under the head "Substitute and Conditional Institute," the other under the head "Presumption." The latter is that which relates to the question raised in the present case, viz., the effect to be given to a general disposition in competition with a special destination by the party from whom the property came to the maker of the general disposition. The Court of Session decided

(1) 1 Paton, 343. (2) 2 Lord Kames, 26.

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that the general disposition did not destroy the special destination; and that judgment was affirmed by the House of Lords. One ground appears to have been that the general disposition was made before the maker of it had right to the estate in question, and that he died before he could have been aware that such right had devolved upon him. It was not, however, disputed that the words of the general disposition were sufficient to comprehend the estate, and must have carried it if there had not been a special destination of it. The estate there in question consisted of moveable property, and it appears to have been suggested about half a century afterwards, that the judgment may have proceeded on the ground that the right to the moveables had not vested in the maker of the general disposition, as he had not expede confirmation. But the suggestion is not borne out by the report of the case or by the printed papers, and at that time, or until 1784, it had not been decided that a right to moveables under a general disposition required confirmation any more than a special legacy.

The point again came up in the case of *Farquharson* (1), and there, also, the decision was against the party who claimed under the general disposition. The words of the general disposition were sufficiently comprehensive to embrace everything, if so intended. But it was maintained that they were not intended to apply to the particular estates in question, and in support of that contention various external circumstances were founded on as sufficient to shew that the general words should not be read in the broad sense in which perhaps they might have been read, if there had been no such light to guide the Court.

The point is said to have occurred again in the case of *Leitch* (2); but the case of *Leitch* differs from the present in many respects. The point now in question was certainly not the main subject of controversy in the case of *Leitch*, and it appears not to have been there pressed in argument. Indeed, Judges of high authority have pointed out that in the case of *Leitch* the circumstances were not such as would have admitted of the application of the principle on which alone such a plea could have been maintained.

The recent case of *Thom* v. *Thoms* (3), in the Court of Session, comes

(1) 6 Paton, 724. (2) 3 Wilson & Shaw, 366.
(3) 6 Macph. 704.

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nearest to the present in this respect, that the maker of the general disposition was the institute in a deed of entail, the fetters of which did not apply to him. That case was fully considered by the whole Court, and the judgment pronounced in accordance with the views of a large majority gave effect to the general disposition. That judgment appears to have proceeded on the ground that in this class of cases the comprehensive terms of the general disposition were to be held presumably as superseding or displacing the previous destination in the absence of any circumstances leading satisfactorily to the conclusion that they were not so intended. No such circumstances, either within the general disposition, or without it, were substantiated in the case of *Thoms*. The substitute heir of entail limited his proof to the deeds themselves, and to a letter which he tendered, but which does not appear to have been admitted, or at all conclusive if it had been admissible. But even the Judges composing the majority recognised as a general principle that each case is circumstantial and "ruled by its own specialties," and one of them illustrated the principle by reference to the case of *Farquharson* already noticed. That principle was afterwards acted upon in the present case by three of the Judges who composed the majority in the case of *Thoms*.

The judgment in the case of *Thoms* was not appealed to this House, and I may, without disrespect to the learned Judges who composed the majority in that case, be permitted to doubt the soundness of the proposition that in this class of cases the general disposition is to be held presumably as superseding or displacing the previous destination. Without at present discussing that debateable proposition I go on to observe that the judgment of the majority in the case of *Thoms* was given subject to this necessary qualification, that reference might be made to circumstances outside the deed to rebut the presumption; and that each case is circumstantial, and to be ruled by its own specialties.

In my opinion the circumstances in the present case that may be legitimately referred to are quite sufficient to shew that the general clause in *Xaveria's* disposition was not meant to include the estate of *Cowgarth*. I have no doubt that for this purpose her mode of dealing with the estate of *Cowgarth* may legitimately be referred to; and I think that in that alone we have enough to

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shew clearly that it was not her intention that the general clause should apply to that estate. In the first place she not only did not convey it formally, as she did the other two lots, but she did not even mention it by name in any *mortis causâ* deed, as she might naturally have been expected to do in reference to an estate of so much importance. That is itself significant. But, secondly, after she had made her general settlement, and down to within a comparatively short period of her death, she, in various matters of importance, in formal deeds dealt with that estate as one which in her view, and according to her own understanding of her settlements, was not to go to her general disponee, but was to continue under the existing destination in the line of descent pointed out by the entail. That I hold to be beyond question, and there is no reason to suppose, or ground for conjecture, that her mind underwent any change on that subject. Whether she believed she had no power to take the estate out of the entail, or believed that she had such power, but chose rather that it should remain within the entail and dealt with it on that footing, is, in my opinion, of little moment; for, in either view, it is clear to me that she could not have intended that the general clause of disposition should apply to it, but must have intended the reverse. Therefore, even if it should be thought that in this class of cases the presumption is in favour of the general disponee, I think that the circumstances I have referred to are quite sufficient in this particular case to rebut the presumption.

I am therefore of opinion that this appeal should be dismissed.

THE LORD CHANCELLOR (1):—

My Lords, if the rule as to the construction of testamentary deeds is the same in *Scotland* as in *England*, viz., that the intention of the testator is to be collected solely from the words which he has used in the instrument itself, extrinsic evidence being inadmissible, except for the purpose of ascertaining the subjects of which those words are properly descriptive, or the subjects to which, if the words are ambiguous or inaccurate, they may appear (after the proof of the facts shewing their ambiguity or inac-

(1) Lord *Selborne*.

curacy), to be most properly applicable, I must confess that I have very great difficulty in understanding how the operation of general words purporting to pass everything which the settlor might be entitled to at the time of his death, can be either enlarged or limited by extrinsic evidence tending merely to shew that the settlor did or did not know or believe that he had a disposing power over some particular property, over which he had such power, or (whether knowing or not that he had such power) that he did or did not actually intend to pass that property by those general words.

I am bound, however, to acknowledge that evidence of this kind appears to have been received, and to have been more or less relied on by the Court of Session, in the two cases which came to this House in Lord *Hardwicke's* time, *Campbell* v. *Campbell* (1) and *Farquharson* v. *Farquharson* (2) and that it was assumed by most (if not all) of the Judges of that Court who lately decided *Thom's Case* (3), that such evidence was admissible, and might (in a case like the present) be decisive. All the authorities, cited in the argument of this case, are consistent with each other, if this ground of decision be adopted. But if this be so, the rule of law in *Scotland*, as to the influence of extrinsic evidence upon the construction of written instruments, differs from that of the law of *England*. That is a conclusion which I confess, for my own part, I should accept with very considerable reluctance ; because the rule, in this respect, of the law of *England*, appears to me to be a consequence flowing almost by logical necessity from another rule, common to the laws of both countries, viz., that every testamentary or *mortis causâ* disposition of real estate must be made and authenticated by some instrument in writing ; or, in other words, that the intention which is to receive effect must be found expressed in a written instrument. I should have thought it the sounder principle, that, subject to any limitation of their meaning afforded by the context of each particular instrument, or by any rule or presumption of law, general words in a testamentary deed ought to be applied to every subject of which, according to the true meaning of the words themselves, they are properly descriptive.

(1) Morr. 14,855, and 1 Pat. App. 343. (2) Morr. 2290.
(3) 6 Macph. 704.

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Holding these views, I should have preferred to rest my concurrence in the judgment proposed to your Lordships upon the doctrine which (if the rules of the law of *Scotland* for the construction of written instruments are the same as those of *England*) would, in my judgment, be properly deducible from the decisions of this House in *Campbell* v. *Campbell* (1) and *Farquharson* v. *Farquharson* (2); a doctrine which is not (as my noble friend has shewn) really at variance with the later decision of your Lordships' House in *Leitch's Case* (3), and which, in *Thom's Case* (4), although not reconcilable with the opinions delivered by a large majority of the Judges of the Court of Session, was maintained by a very weighty minority. The doctrine that mere general words, purporting to dispose of a man's whole property, in a will or *mortis causâ* deed, shall (unless there be something in the instrument itself to control the presumption) be understood of property the succession to which, after the death of the testator, is not already regulated by a special destination to a particular class of heirs in a prior instrument, either made by the testator himself, or under which he holds; and that the testator is not, merely by the use of such general words, presumed to intend to innovate upon any such special course of succession, seems to me to be neither unreasonable nor inconvenient. The words "revocation" or "evacuation" may not be apt to describe the effect produced by an instrument devising lands held under such a title to other persons, because (as was justly said at the Bar) such an instrument would operate upon the absolute fee, legally vested in the person executing it, not by altering the special destination, but by withdrawing from it altogether the subject matter of the settlement. If, however, substance rather than technicality is to be regarded, the analogy of revocation, properly so called, is not without a legitimate bearing on this class of cases. It is admitted that if a special destination were contained in a prior deed (even though not strictly a *mortis causâ* disposition) executed by the testator himself, it would prevail against a subsequent disposition, by general words, of all his property in a testamentary instrument, and it further seems to be the law of *Scotland*

(1) Morr. 14,855, and 1 Pat. App. 343.

(2) Morr. 2290.

(3) 4 S. 665, N. E.; and 3 W. & S. 366.

(4) March 30, 1868; 6 Macph. 704.

(on the ground that an intention to innovate on a special course of succession is not readily presumed) that when a reference to "heirs" is found in the dispositive words of an instrument executed by a testator holding a particular estate, although without fetters, under a prior deed of entail (whether executed by himself or by any other person) it must, *primâ facie*, be taken that the heirs intended by the later instrument are those to whom the estate would go by virtue of the destination in the earlier deed. The doctrine maintained by the minority of the Judges in *Thoms' Case* seems to me to depend on the same principle, and I find it easier to suppose that this doctrine was the real foundation of the decisions of your Lordships' House (under the advice of so great a Judge as Lord *Hardwicke*), in the two cases of *Campbell* and *Farquharson* than to refer those decisions entirely to the weight of the extrinsic evidence which was undoubtedly received in them. But, whatever may be their true ground, I do not think it would be possible to reconcile those decisions of your Lordships' House with a judgment of reversal in the present case, and I concur in the propriety of the motion which has been made to your Lordships by my noble friend.

LORD CHELMSFORD:—

I am of opinion that this interlocutor ought to be affirmed.

Affirmance with costs.

Appellants' agents: Messrs. *Loch & Maclaurin.*
Respondents' agents: Messrs. *Valpy & Chaplin.*

1873
June 16.

SIR WILLIAM FORBES, Bart. . . . . Appellant;
THE HONOURABLE CHARLES TREFUSIS . Respondent.

Strict Entail—Distinct Stocks—Exhaustion of each—Succession thereon respectively.

Per The Lord Chancellor:—The whole issue, male and female, of each *stirps* is to be exhausted before resorting to the subsequent limitations.

In 1811, Sir *John Stuart* of *Fettercairn* settled his estate in strict entail. He had no son. His only child, a daughter, *Williamina,* then deceased, had married Sir *William Forbes* of *Pitsligo;* and of that marriage there were sons and daughters.

By the deed of entail, Sir *John Stuart,* after securing the *Fettercairn* estate to himself, and failing himself to the heirs male of his body, settled the subsequent succession as follows:—

"To the said Sir *William Forbes* and the heirs male of his marriage with my daughter the deceased *Williamina,* and the heirs male of their bodies respectively; whom failing, to the heirs whatsoever of the bodies of such heirs male respectively; whom failing, to the heirs female of the said marriage, and the heirs whatsoever of their bodies respectively; the daughter of the heir who shall happen to be last in possession succeeding always preferably to the daughters of any former heir so often as the succession through the whole course thereof shall devolve upon daughters."

Sir *John Stuart,* the maker of this entail, died in 1821, and was succeeded by his son-in-law, Sir *William Forbes;* who, dying in 1828, and leaving three sons, was succeeded by the eldest of them, Sir *John Forbes,* who died in 1866, without male issue, but leaving a daughter *Harriet,* who in 1858 had married Lord *Clinton.*

Lady *Clinton* took possession under the entail. She died on the 4th of July, 1869, leaving by her marriage with Lord *Clinton* a son, born on the 18th of January, 1863, the above Respondent, who now, by his administrator, enjoys the *Fettercairn* estate under Sir *John Stuart's* entail.

The present action was commenced against Lady *Clinton* in 1866; and on her death was continued against her son. The

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Pursuer, Sir *William Forbes*, is son of the second son of the Sir *William Forbes* who died in 1828; the summons asserting the Pursuer's exclusive right to the *Fettercairn* estate, on the footing that *he*, and not Lady *Clinton*, was the nearest heir of entail under the deed of 1811; the same contention being urged against her son, the Appellant.

The Lord Ordinary (1) decided in favour of the Pursuer and against Lady *Clinton;* holding, that "under the deed of 1811 heirs male of the bodies of heirs male of the marriage between Sir *William Forbes* and *Williamina* were entitled to preference over heirs female or heirs whatsoever."

Upon Lady *Clinton's* reclaiming petition the case was heard by the First Division of the Court below, aided by three Judges of the Second Division, by all of whom, on the 10th of June, 1868, the Lord Ordinary's judgment was reversed (2), the seven Judges concurring in opinion that the descendants male or female of each *stirps* under the entail should have the precedence attached to their respective progenitors, and therefore that Lady *Clinton* was the party to whom the succession in this case had opened.

Sir *William Forbes* appealed to the House, having for his counsel the *Dean of Faculty* (3) and Mr. *Anderson*, Q.C.

The *Lord Advocate* (4), the *Solicitor-General* (5), and Mr. *Robert Lee*, of the Scotch Bar, appeared for the Respondent, who had succeeded his mother Lady *Clinton*.

At the close of the argument the following opinions were delivered.

THE LORD CHANCELLOR (6) :—

My Lords, in this case your Lordships have the benefit of a very careful and well considered judgment, not only of the Judges of the First Division, but also of the consulted Judges; and the result of these united deliberations was to produce unanimity, the Judges of the First Division having been originally divided in their opinions, so that it would be only on very strong grounds that your

(1) Lord *Jerviswoode*.
(2) 3rd Series, vol. vi. p. 900.
(3) Mr. *Gordon*, Q.C.
(4) Mr. *Young*, Q.C.
(5) Sir *George Jessel*, Q.C.
(6) Lord *Selborne*.

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Lordships would be disposed to decide against such a weight of authority. The learned Lord Ordinary, who came to a different conclusion, founded his decision in a considerable degree on a view of the construction of a part of this deed which is no longer insisted upon at the Bar; and therefore it may be doubted whether, if his Lordship had had the benefit of further consideration he might not have concurred in the judgment now submitted to our review.

On examining the deed of entail the first thing which I think is clear, and which was hardly disputed by the Dean of Faculty in his reply, is this; that although "the heirs male procreated of the marriage" and in a later place, "the heirs female procreated of the marriage" between Sir *William Forbes* and the settlor's daughter, are words which might have extended to all the male line descending from that marriage, and all the female line also descending from that marriage, yet it appears from the context of this particular deed that such is not truly their meaning; because having spoken of "the heirs male procreated of the marriage" between Sir *William Forbes* and the settlor's daughter, the deed goes on with the words "and the heirs male of their bodies respectively;" plainly, therefore, speaking of the first heirs male procreated as the authors of several *stirpes* or lines from whom other heirs male were to take by inheritance. That by itself I think, unless there were other difficulties in the context, which do not occur here, would be a sufficient reason for taking "heirs male" to signify sons, and to be a word descriptive of the sons who are to be the heads of several *stirpes*, and the heirs female in like manner to be daughters. And although the words "procreated of the marriage" between two persons named, are words that would not necessarily exclude the ulterior descent of a remoter issue from them, yet in their strict and accurate signification they are certainly more appropriate to issue of the first generation than to any afterwards who are truly and literally procreated of other persons, though their immediate parents may be traced back to the persons named.

Having arrived at that construction, one material step has been made towards the rest of the construction, because we have thereby ascertained that this entailer intended several *stirpes* to take one

after another in the order of primogeniture and not a single *stirps* to take according to the ordinary rules of simple descent.

That construction is further illustrated by a comparison of this portion of the deed with those parts which follow it; because when the entailer intended a simple destination to the heirs male of the body of a particular person he knew how to express it, for he goes on to say, " whom failing to *John Hepburn Belsches* and the heirs male of his body; whom failing to the heirs male of the body of the said Sir *William Forbes* in any subsequent marriage; whom failing to Sir *George Abercromby* and the heirs male of his body; whom failing to the heirs whatsoever of the body of the said *John Hepburn Belsches*," in every case expressing himself in the manner in which, if the argument for the Appellants were sound, he might have been expected to express himself in this first part of the deed. For in truth the argument of the Appellant is, that all this amounts in the result to neither more nor less than if the entailer had simply said, failing the heirs male of his own body, to Sir *William Forbes* and the heirs male of his body by his marriage with my daughter, whom failing, to the heirs female of the said Sir *William Forbes* by the same marriage. For that of course it would have been quite unnecessary to have used the very special language which this entailer has used, dividing the *stirpes* instead of uniting them in one, using the word " respectively," and contrasting the language of this part of the deed in the manner in which he has contrasted it with the parts which follow.

Now it is certainly a sound rule to hold, that words such as these, occurring in a deed, are used for a purpose rather than without a purpose. I think, therefore, that if we can place a reasonable construction upon the words which occur here, and which are treated as superfluous by the Appellant's argument, we ought to do so. The Appellants' argument turned very much upon what was said to be the proper or technical force of the words " whom failing," which it was said were words intended after the exhaustion of one limitation, or a series of limitations, to introduce another. To that proposition I see no reason whatever for taking the slightest exception; but it is in truth a mistake to suppose that it is a proposition in any way inconsistent with the judgment of the Court below. The same effect, neither more nor less, is given by the argument on

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both sides to these words "whom failing." Both agree, that on the failure of one line they are meant to be introductory of another. The question is not as to the effect of the word "failing," but as to the effect of the word "whom." What is the antecedent to which the word "whom" is relative? The *Largie Case* (1) has no tendency whatever to throw the least light upon that, which is the only question in this case; because it is admitted by the Respondents, that the destination "to the heirs whatsoever of the bodies of such heirs male respectively," is not to take effect until the failure of the heirs male of the bodies previously mentioned. The question is, what is the true antecedent of the relative word "whom?" Now I cannot help thinking that the Court below had sound reason for answering that question as they have answered it, in this way: that the "heirs male of their bodies respectively," is the antecedent; not "the heirs male procreated of the marriage between" the settlor's daughter and Sir *William Forbes* and their descendants, but the heirs male of their bodies, "respectively."

The effect of the word "respectively" introducing the gift over, which commences with the words "whom failing," and recurring at the end of that gift over to the "heirs whatsoever of the bodies of such heirs male respectively," such heirs male being there clearly such sons, is to import the force of that word "respectively" into the entire sentence; and it is not really distinguishable in sense from what it would have been if, as was put to the Counsel in the course of the argument, it had been "whom respectively failing," or "whom failing respectively," the effect of it being, that the heirs of the bodies of each *stirps* are to succeed in this manner —the heirs male first, the heirs female afterwards—but both succeeding next respectively to the parent towards whom they stand in the relation of heir, and are meant to stand in the relation of successor. That word "respectively" is, in its natural and proper sense, and with the force which it constantly has in these legal instruments, a word at once of distribution and connection. It distributes when a series of persons is intended to take, or to take in a certain order or manner; and it is a word of connection, because it brings together, by reference, the heir to the ancestor, the issue or the child to the parent. So understood here, it seems

(1) *Lockart* v. *Macdonald*, 1 Bell Ap. 202.

to be only a short term for expressing a series of limitations, in each of which, as I understand it, and as the Court below has understood it, the whole issue of each *stirps* is to be exhausted before you go on to the subsequent limitations, the male issue, however, being always preferred to the female.

I do not know that we really need more to support this construction than the reasons which I have offered to your Lordships, and which in truth are more fully and more ably expressed in the judgments of the Court below, particularly the judgment of Lord *Curriehill* (1) and Lord *Benholme* (2). But although it was quite right, on the part of the learned Counsel for the Respondents, not to lay their main stress upon subordinate clauses, which assist rather by way of illustration than by direct construction, yet I cannot but think that the subsequent clause, as to the rule which is to apply upon the succession of daughters, is much more consistent with the construction placed upon this instrument by the Court below than with that contended for by the Appellants. Your Lordships will observe that the effect of the Appellants' construction is to reduce this to the simple elements which I mentioned at the outset, the single *stirps* of Sir *William Forbes*, or rather of the entailer's daughter as the wife of Sir *William Forbes*, there being a preference of the male issue descending from that *stirps* over the female, but subject to that preference, a simple gift, first to the male issue of that *stirps* and then to the female. On the other hand the construction which the Court below has adopted, and which I think is hardly now contested as far as the division of the *stirpes* is concerned (I mean as far as the construction of the words "heirs male procreated" and "heirs female procreated" are concerned) makes several *stirpes* each to take successively, the one after the other.

Now, with which of these two constructions is the declaratory clause most consistent? Your Lordships will see that the declaratory clause contemplates the rule to be followed for female succession, the succession of daughters, always, "so often as the succession through the whole course thereof shall devolve upon daughters," that rule being that the daughters shall take with reference to the latest taker, I mean with reference to the last state of possession

(1) 3rd Series, vol. vi. p. 903. (2) Ibid. p. 906.

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by the heir from whom that daughter takes; that, for instance, if there should be a daughter of the last taker in the male line, that daughter should succeed before the daughter of any former taker in the male line. I think that this rule, fairly understood, will also give a clue to the mode of succession if that daughter's line were exhausted, or if the last taker in the male line died without any issue at all; then you are still to look to the last previous possessor, and the female taker is to take in the order of possession reversed, that is, that the heir representative of the family in the preferred male line transmits to his own daughter as his successor, and if that line fails you then go back to the next preceding male heir in the preferred male line, and his daughters will take in preference to the daughters of any former ones. That is a mode of succession at least more consistent with the division of the whole into *stirpes*, and the succession of the females of each *stirps* after the failure of the males of that *stirps*, than with the notion that all the males of a single *stirps* are to be completely exhausted, and then all the females are to come in; and it is to happen *toties quoties*, the words of the deed implying, that, in the contemplation of the settlor, it may happen again and again, and not once or twice only

However, my Lords, I agree entirely with what was said, that after all, from these subsidiary clauses illustration rather than proof is to be derived. All that I venture to say is, that taken in the manner in which they have been taken by the Court below, the result is something consistent with the ordinary scheme of a family settlement in strict entail, where you have a division like this into a certain number of *stirpes;* and that the opposite view is very much less consistent with the ordinary scheme of such a settlement. Therefore I think the antecedent probability concurs with the conclusion at which I arrived from the words themselves, and particularly from the governing word "respectively," as found in the earlier part of the instrument; and on the whole I advise and move your Lordships to affirm these interlocutors, and to dismiss this appeal with costs.

LORD CHELMSFORD:—

My Lords, I must confess that I have felt considerable doubt in the course of the argument as to the proper construction of this

deed of entail of 1811, nor can I say that that doubt has been entirely removed; but considering that we have here the unanimous judgment of seven learned Judges in the Court of Session, which judgment is concurred in by the opinion of my two noble and learned friends, I feel that my doubt is unfounded, or, at all events, that it ought to yield to such high authority. I therefore agree that these interlocutors should be affirmed.

LORD COLONSAY:—

My Lords, I concur entirely in the opinion which has been expressed by my noble and learned friend on the woolsack. It appears to me that the deed of entail makes each of the sons of the marriage a *stirps*; and that it says with regard to those sons respectively, that is, as to each *stirps*, that the descent shall be to the heir male of his body, whom failing, to the heirs whatsoever of the body of such sons. I think that is the natural reading of the words, and decisive of the whole question, consistently with the ordinary course of descent in such cases, and reconciling the subsequent clause better than if we took the opposite construction.

Affirmance with costs.

Appellant's Agent: *William Robertson.*
Respondent's Agents: *Loch & Maclaurin.*

1873
July 28.

THE EDINBURGH STREET TRAMWAYS COMPANY . . . . . } APPELLANTS;

A. & C. BLACK *et al.* . . . . . RESPONDENTS.

General Tramways Act of 1870—*Edinburgh Tramways Act*, 1871.

The General Act of 1870 is to facilitate the construction and to regulate the working of tramways in *England* and *Scotland*. The *Edinburgh* Act of 1871 is to authorize the construction of street tramways in certain parts of *Edinburgh*, *Leith*, and *Portobello*.

Tramway-Rail and Footpath.

Case in which the rule that 9 feet 6 inches shall intervene between the tramway-rail and nearest foot-path was departed from by statutory authority; the House reversing the decree complained of.

Tramway Works—Recall of Interdict.

Relying on certain preliminary agreements, the frontagers of a narrow thoroughfare abstained from opposing the *Edinburgh Tramways Bill*; but as it turned out that the Act, when passed, allowed the very thing which the frontagers had been most anxious to prevent, they asked and obtained from the Court of Session an interdict against its execution. But the House of Lords recalled the interdict, holding that the question was determined by the statute, which the *Tramways Company* were not only entitled to carry out, but bound to obey.

Provisional Order from Board of Trade.

Held, also, that the same consequences would have arisen in the case of a provisional order from the Board of Trade, when confirmed by Parliament.

Deposited Plans and Sections.

When the Act directs compliance with deposited plans and sections, they are regarded as embodied in the statute.

BY the *General Tramways Act* of 1870 (1), applicable to *England* and *Scotland*, it is enacted that no tramway shall be authorized by any provisional order to be so laid that there shall be a less space than 9 feet 6 inches between the outer rails of tramways and the nearest kerbs or sideways; but this intervening space may be less when the promoters have given due notice to that effect, and when no adequate and timely expression of dissent has emanated from the adjacent owners and occupiers, the *frontagers*, as they are called by the language of Parliament. This statute introduced facilities

(1) 33 & 34 Vict. c. 78.

for the carrying through of tramway bills and the construction of works by means of provisional orders issuing from the Board of Trade and confirmed by Parliament.

In the Session of 1871 the above Appellants obtained a local Act of Parliament (1) incorporating them as "the *Edinburgh Street Tramways Company*," and authorizing them to construct double lines of tramway in certain parts of *Edinburgh*, including the narrow and crowded thoroughfare of *North Bridge Street;* as to which the sole question in the present case arose. This local statute set forth three scheduled agreements, dated in February, March, and April, 1871, between three local authorities on the one hand and the promoters of the bill on the other (2); the 1st section of each of these three agreements containing a clause expressed in the following terms:

> The local authorities shall have the whole rights, powers, and privileges which the *Tramways Act*, 1870, confers, and its provisions shall apply to the Act now being solicited as if it were a provisional order obtained under the *Tramways Act*, 1870.

The *Edinburgh Tramways Act*, 1871, however, was carried through Parliament as a distinct and independent legislative enactment, and not as a provisional order under the *Tramways Act*, 1870.

The *Edinburgh Tramways Act*, 1871, passed on the 29th of June, 1871, without any opposition, or objection, or expression of dissent from the Respondents. It enacted that the company should lay down their tramways in accordance with the plans and sections deposited by them; they having duly published and served the notices required by the Standing Orders of the House of Commons before the bill was proceeded with; these plans, sections, levels, and notices distinctly intimating, among other things, that with reference to *North Bridge Street* there might be a less space between the kerb and the rails than 9 feet 6 inches; a result contemplated by the 8th section of the Act, which provided that in such cases "passing places" should be secured for the accommodation of the public; a requirement which the company had complied with.

The tramway works in *North Bridge Street* were nearly com-

(1) 34 & 35 Vict. c. 89, authorizing the construction of street tramways in *Edinburgh*, *Leith*, and *Portobello*, "to be worked by animal power only."

(2) See Lord *Chelmsford's* opinion, *infra*, p. 339.

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pleted, when, on the application of the above Respondents, who constituted more than one-third of the whole occupiers of houses, shops, and warehouses abutting upon this street, the Lord Ordinary (1), in April, 1872, granted an interim interdict against the Appellants; but afterwards, the record being closed, he, in a note to his interlocutor, remarked that there had been produced "a copy of the complete parliamentary plans with a sheet of letter-press which, though it met to some extent the considerations which had induced him to grant the interim interdict, and though he considered the case was attended with very great difficulty," he, nevertheless, adhered to his previous interlocutor, holding that the Appellants had no right to construct their tramway in *North Bridge Street* as they proposed.

The Appellants reclaimed to the First Division of the Inner House, where, after full argument, the decision of the Lord Ordinary was on the 25th of February, 1873, affirmed with costs by a majority of three Judges, Lord *Deas*, Lord *Ardmillan*, and Lord *Jerviswoode*, against one, the Lord President *Inglis*, who, in delivering his opinion, made the following remarks:

> The first thing that we observe, upon looking at the parliamentary plan, is that power is given to the company to make, not one, but two, lines of tramway along the whole of *North Bridge Street*. And it seems to me mathematically demonstrable that it is impossible to construct these lines in such a way as to escape from the result that the space between the outer line of each tramway and the curb stone shall be less than 9 feet 6 inches. But it is said that there are three agreements here. The present complainers, however, are not parties to any of these agreements. What is the *Edinburgh Tramways Company* to do in such circumstances? If the *Edinburgh Tramways Act* is to be dealt with as a provisional order "obtained" from the Board of Trade and not confirmed by Parliament, what will be the consequence? The company will have no authority whatever; for a provisional order, until confirmed by Parliament, is absolutely worthless. Now to say that a special Act of Parliament which has passed both Houses, and has received the royal assent, is to be in the same position as a mere provisional order not confirmed by Parliament, is too startling a proposition to receive assent. I am therefore constrained, without consideration of other matters that have been imported into this discussion, to come to the conclusion that upon the construction of the *Edinburgh Tramways Act* of 1871, these lines of tramway could be constructed in no other manner than that in which they have been constructed (2).

Against the decision of the First Division the *Edinburgh Tramways Company* appealed to the House of Lords, having for their

(1) Lord *Gifford*. (2) Court of Session Cases, 3rd Series, vol. xi. p. 434.

counsel the *Lord Advocate* (1), Mr. *Clerk*, Q.C., and Mr. *James L. Mansfield* (of the Scotch Bar). They contended, in the first place, that their Act gave them power to lay double lines in conformity with their deposited plans and sections, which they had followed implicitly; secondly, that their Act authorized double lines of tramway in a given portion of the *North Bridge Street*, without reference to the 9th section of the *General Tramways Act* of 1870, that Act not applying to the *Edinburgh Street Tramways Act*, which stood on its own legislative authority; and, thirdly, that even if their Act were to be read as if it were a "provisional order, obtained under the *Tramways Act*, 1870," in terms of the 1st section of the agreements between the promoters and the local authorities, it meant a provisional order, completed and confirmed by Act of Parliament, so that the General Act, 1870, could not apply.

Mr. *Horace Lloyd*, Q.C., Mr. *E. H. Pember*, and Mr. *Maclaren* (of the Scotch Bar), for the Respondents, maintained that the 9th section of the *General Tramways Act* of 1870, as to the 9 feet 6 inches regulation, governed the present case; and that at all events the company were bound by the three agreements set out and made part of their statute, which in effect amounted to nothing more than a provisional order from the Board of Trade.

The following opinions were delivered by the Law Peers:—

LORD CHELMSFORD:—

My Lords, the question in this case depends upon the effect of an article in an agreement contained in the schedule to the *Edinburgh Tramways Act*, which schedule is by the 44th section of the Act made part of the Act. By the 5th section the company are

> To make, form, lay down, and maintain the tramways hereinafter described, in the lines and according to the levels shewn on the deposited plans and sections, and in all respects in accordance with those plans and sections.

We had occasion, a short time ago (2), to consider the question as to the effect of plans and sections deposited and referred to in

(1) Mr. *Young*, Q.C.

(2) *Attorney-General* v. *Great Eastern Railway Company*, which was before the House on the 14th of July, 1873; Law Rep. 6 H. L. 367.

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this manner; and we found that in the case of the *North British Railway Company* v. *Todd* (1), it was laid down that where there is such a reference as this to the plans and sections in an Act of Parliament, they are to be held as incorporated into the Act. The provision here is most express that the tramways are to be constructed in all respects in accordance with the deposited plans and sections. Now, according to the description of the plans and sections the company are to make a double line of tramway, in which the space between the outer line of rails and the footway on each side of *North Bridge Street* must be less than 9 feet 6 inches. By the agreement which was entered into, and which is made a part of the Act, the company bind and oblige themselves "to construct and work the tramways described in the said Bill, and shewn on the parliamentary plans." Therefore the company, under the Act and the agreement, which is made a part of it, are bound to make the tramways in accordance with the plans and sections.

But it is said that by the agreement one-third of the owners of houses abutting upon *North Bridge Street* have a right to object to the tramway being brought within 9 feet 6 inches of the footway. The first clause of the agreement says:

> The parties hereto of the first part, as the local authority foresaid, shall have the whole rights, powers, and privileges which the *Tramways Act*, 1870, or any any other general Act relating to tramways now in force, or which may hereafter pass during this or any future session of Parliament, confer, or may hereafter confer upon the local authority of any district, and the whole provisions of the said Acts shall apply to the Act of Parliament which the said second party is now promoting, or to any Act of Parliament which they or the company may hereafter obtain, as fully in every respect as if the same were a provisional order obtained under the *Tramways Act*, 1870.

The 9th section of the *General Tramways Act* of 1870 provides that

> Every tramway in a town, authorized by provisional order, shall be constructed and maintained, as nearly as may be, in the middle of the road; and no tramway shall be authorized by any provisional order to be so laid that a less space than 9 feet and 6 inches shall intervene between the outside of the footpath on either side of the road and the nearest rail of the tramway, if one-third of the owners, or one-third of the occupiers of the houses, shops, or warehouses

(1) 12 Cl. & Fin. p. 722 (1846).

abutting upon the part of the road where such less space shall intervene as aforesaid, shall in the prescribed manner, and at the prescribed time, express their dissent from any tramway being so laid.

The first clause of the agreement provides that the general Act shall apply "as fully in every respect as if the private Act were a provisional order." A great deal of controversy has taken place as to the exact meaning of those words; but I apprehend they must refer to a provisional order obtained, completed, and confirmed by Act of Parliament. Now, supposing, instead of being an Act of Parliament, this had been such a provisional order, it would have been one, of course, as I have already said, confirmed by Act of Parliament. How could there be a veto by the owners under those circumstances? Taking the case of a provisional order, they could only have interposed while it was in progress; that is to say, after notice had been given of the intention to apply for a provisional order. They might then have given notice of their objection. But under those circumstances, supposing there was no dissent at all, a provisional order of course might be made which allowed a tramway to be constructed with an intervening space between the footway and the outer rail of less than 9 feet 6 inches. Such a provisional order of course would be utterly incapable of being resisted afterwards; and how, under these words, putting the Act of Parliament upon the same footing as a provisional order, could the owners possibly, when the Act of Parliament was passed, have any veto whatever? And how can it possibly be understood that this reference to the first part of the *General Tramways Act* with regard to provisional orders can have any application to a case of this description? The local authority having for the protection of the public bound the company to make their tramways according to the plans which the Act of Parliament authorized, can it be believed that by a general reference to rights which third persons would have to prevent provisional orders being made to their prejudice, they intended to prevent the Act of Parliament being carried out? The agreement upon which the Respondents insist is, according to their construction of it, utterly inconsistent. One part compels the company to do the works which are authorized by the Act; the other, according to the argument of the Respondents, allows the owners

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to say that what the Act sanctions and the agreement compels shall not be done. Even putting it upon the lowest possible ground, the part of the Act as to the execution of the works is clear and distinct, and the obligation to execute the tramways as prescribed by the Act is express. The qualification is hard to be understood, and is capable of a construction which renders it wholly inoperative.

My Lords, I should not have entertained the slightest doubt upon this case if it had not been for the respect which I feel for the judgment of the three learned Judges who have expressed a contrary opinion; but it appears to me that the owners have no right whatever to the interdict which has been granted to them, and therefore I submit to your Lordships that the interlocutors appealed from ought to be reversed.

LORD COLONSAY:—

My Lords, with every respect for the opinions of the majority of the learned Judges in the Court below, I cannot come to any different conclusion from that which has been arrived at by my noble and learned friend. It appears to me that the only contention that could be maintained with plausibility here is that which is founded on the notion that the 9th section of the General Act was somehow imported into this statute and formed a condition which overrode the other provisions of the Act. But I think that is a strained construction of the agreement, and that it is founded not only on straining the construction of the agreement, but also on straining the objects and purposes of the 9th section itself. I therefore cannot adopt the conclusion which has been come to in the Court below.

It appears to me that the Respondents in this case have been rather negligent of their own interests as to the result of this tramway passing through their street. Either they had not measured the street and ascertained what would be the effect of the tramway according to the plans, or they relied upon some protection from the local authority. However, looking to the agreement as it stands, and considering what the purposes of the 9th section of the General Act are, I cannot concur with the views taken in the Court below.

As to the form of the judgment to be pronounced here, I apprehend that the interlocutors appealed from must be reversed. Then, I presume, there will be a remit to recall the interdict, and repel the reasons of suspension.

LORD CAIRNS:—

My Lords, the learned Judges in the Court below appear to have been very much influenced by a consideration of the great danger which would arise to the public unless the fullest care was taken as to the mode in which license was granted for making the tramways contemplated. In those considerations I entirely concur; but it appears to me that the time has passed for giving weight to them. All that the Court below had to do, and all that the House has now to do, is to ascertain what is the extent and ambit of the parliamentary authority which has been granted to the Appellants.

Now, if the three agreements between the Appellants and the different local bodies are put aside for a moment, it is perfectly clear, under the local Act of Parliament, that when the company were interfered with by the interdict they were making, or had made, a tramway along the *North Bridge Street* in exactly the way that was authorized by the local Act; and, in point of fact, the Act would not have authorized them to make it in any other way than the way in which they were making or had made it. If there were nothing more in the case, there would be no room for argument.

But the authority given by the Act of Parliament is attempted to be controlled by the 1st section of each of the three agreements which were entered into by the local bodies. Now, I own that it is not very easy to give a clear and distinct interpretation to that 1st section of those agreements. I doubt very much whether the parties had themselves, in their own minds, any very clear and intelligent apprehension of what that 1st section meant; but if it is not possible to give a very clear and distinct meaning to the section, certainly that section cannot be made available for the purpose of curtailing and restraining the clear and distinct power entrusted by the Act of Parliament to the Appellants. As it appears to me, the utmost that the 1st section of the agreement does is this: it provides that the provisions of the General Acts

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should apply to the Act of Parliament which was then being solicited by the company, or to any other private Act of Parliament which the Appellants might afterwards obtain, as fully in every respect as if the same, that is, as if the private Act, were a provisional order obtained under the *General Tramways Act* of 1870. Now, what advantage that would give to the parties, or was supposed to be likely to give to the parties, I am not quite sure; but I see clearly that the words they have used hypothetically are these: "As if" the Act of Parliament "were a provisional order obtained under the *Tramways Act*, 1870." But if the provisional order were obtained under the *Tramways Act* of 1870, the time for objection had passed, the time for exercising a veto was gone—the provisional order was in existence, and whether that were an order which had passed through its stages properly or improperly, is quite immaterial. The Act of Parliament coming over the order and upon the top of the order, did away with all consideration of the foundation of the provisional order and took the place of the provisional order as an Act of the Legislature. It appears to me that it is only with that Act that we have now to do, and that there is no power in any Court to restrain the Appellants, so long as they follow its provisions, which it is not pretended they are not doing.

Therefore, my Lords, I agree that in this case the interdict should be recalled.

LORD HATHERLEY—

If your Lordships look to the *General Tramways Act* of 1870 you will find that it is divided into three parts; the first part relating to the mode of proceeding to obtain provisional orders; the second part relating to the construction of tramways; and the third giving power for the using of tramways. The second and third parts of the *General Tramways Act* of 1870 are incorporated into the *Edinburgh Tramways Act* of 1871, which we are considering: the first part is not so incorporated; but it happens that in that first part there is the 9th section, upon which so much discussion has arisen, by which section a power is given to one-third of the frontagers to put an absolute veto upon the making of any provisional order empowering the construction of such a tramway

unless a certain distance be kept between the extreme edge of the tramway and the kerb at the outside of the footpath.

Now, my Lords, there is no possibility of arguing this case as if that Act had expressly said that no provisional order can be made at all which will bring the edge of the tramway within that distance of the footpath irrespective of there being consent on the part of the frontagers or not; for the introduction of the question of the consent of the frontagers makes it clear that such an order is not in itself an invalid order. It is an order which has the full force of an Act of Parliament unless that dissent has been interposed before the order is made. The order is perfectly good, although it allows a more limited space—it may be a much more limited space—between the tramway and the footpath; because, when the order is once made, and there has been no opposition on the part of the frontagers, it will be assumed that it is a proper, full, and complete order.

That being so, we come to the *Edinburgh Tramways Act* of 1871 and the agreement recited in it. I think it is of considerable importance for the purpose of coming to a just conclusion as to the intention of that Act of Parliament to observe that it pointedly incorporates the second and third parts of the *General Tramways Act* of 1870, and does *not* incorporate the first part. The only way in which the first part of the *General Tramways Act* of 1870 can be said to be introduced is that the *Edinburgh Tramways Act* confirms by its 44th section an agreement made between the parties, that is to say, between the local board and the promoters of the tramway; and that agreement provides that as between the parties it shall be as if the first part of the *General Tramways Act* of 1870 had been introduced also. Still it does not introduce the first part at all except by saying that as between the parties to this agreement it shall be as if it were expressly enacted. The very fact of the Act of 1871 saying that the second and third parts of the Act of 1870 shall be considered to be incorporated in the Act of 1871 is an exclusion, as it appears to me, of the first part.

Upon the whole, my Lords, the agreement simply comes to this, that the local bodies stipulate that not only as to this Act, but as to all future Acts as well as this, whenever the promoters of this tramway are minded to have any tramway whatsoever in *Edin-*

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burgh, they shall not have an advantage by proceeding by special Act instead of proceeding by way of provisional order; but it shall always be dealt with as between these parties, as if the powers obtained were obtained by virtue of a provisional order, and therefore they shall be subject to all such rights and advantages as might be claimed by virtue of that arrangement. Now it is said that it is very difficult to point out what the particular advantages would be of that arrangement. I quite agree that it is extremely difficult to point out what the particular advantages would be; but I am quite clear of one thing, and that is, that the local authorities had not the slightest idea that they could object only at the proper time, that is to say, before the order was made. In the present state of things the local authorities might say to the company, "This shall be treated as if a provisional order had been made, and we insist on your carrying out the article in our agreement that you will execute the tramway in the manner you have undertaken to do, that is to say according to your plans," which is a manner perfectly inconsistent with the contention of the Respondents.

My Lords, I certainly feel that degree of diffidence which one ought always to feel in these cases, considering the great weight of authority in the Court below. I feel the weight of that authority, but I cannot bring my mind to any other conclusion than that which I have stated. It must be, no doubt, owing to some defect on my own part that I cannot see the force of the reasoning leading to the contrary conclusion.

The interlocutors complained of reversed; the Respondents to pay the Appellants their costs, incurred in the Court below; and the cause remitted back with directions to recall the interdict.

Appellants' Agents: *Ashhurst, Morris, & Co.*

Respondent's Agents: *Simson, Wakeford, & Simson.*

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Compulsory Reference to Arbitration.

Where under an agreement, legislatively confirmed, the parties were bound to settle by arbitration all differences that might arise between them as to the meaning and effect of the agreement, or as to the mode of carrying it out, it was *held* by the House that the jurisdiction of the Courts was, by this agreement, excluded, and that all disputes arising under it must be settled by arbitration.

Per THE LORD CHANCELLOR (1):—We have here no room for the application of the doctrine as to voluntary agreements; but have simply to consider the case arising upon an Act of Parliament, forcing the parties to have their disputes settled, not by the ordinary tribunals of the country, but by arbitration.

IN April, 1862, an agreement was concluded between the *Caledonian Railway Company* and the promoters of the *Greenock and Wemyss Bay Railway Company*, who had applied to Parliament for an Act of Incorporation, which passed in the course of the session. By the agreement, which was scheduled to the Act, the *Caledonian Railway Company* undertook to work the projected line and also to contribute one-fourth to its capital. The line was opened in 1865, and has been worked since conformably to the agreement, which provided that the *Caledonian Railway Company* should be entitled to one fourth share of the net revenue, in consideration of their contributions and assistance. It appeared, however, that they soon became dissatisfied with their receipts. In February, 1871, they brought the present action against the *Greenock and Wemyss Railway Company* demanding payment of several sums amounting to about £3480, independently of interest.

The Defenders pleaded, in the first place, that the action was excluded by a clause in the agreement which provided that all differences arising between the parties should be settled by arbitration (2); and, secondly, that after clearing the proper expenses of the *Greenock and Wemyss Bay Railway*, there was no surplus or balance remaining to meet the Pursuer's claim.

(1) Lord *Cairns*. (2) See the Lord Chancellor's opinion, *infra*, p. 348.

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The Lord Ordinary (1) sustained the first plea, and dismissed the action. Against his interlocutor the *Caledonian Railway Company* reclaimed to the First Division of the Inner House, who, taking the assistance of three Judges of the Second Division, and making in all seven Judges, decided on the 2nd of July, 1872 (2), that the question "fell to be settled by arbitration under the 18th article of the agreement;—superseding further consideration of the cause until the said question should be settled by arbitration in the manner prescribed by the *Railways Clauses Consolidation (Scotland) Act*, 1845" (3). Against this judgment the *Caledonian Railway Company* appealed to the House.

The *Attorney-General* (4), and Mr. *Kay*, Q.C., were heard for the Appellants.

The *Lord Advocate* (5), and Mr. *Cotton*, Q.C., appeared for the Respondents; but were not called upon to address the House, whose judgment was delivered at once, in conformity with the following opinion:

THE LORD CHANCELLOR (6):—

My Lords, the question in this case is, whether the Respondents were well founded in their first plea, which alleged that the action brought against them was excluded by clause 18 of the agreement. That agreement was entered into with the *Caledonian Railway Company*, then an incorporated company. The contractors on the other part were the promoters of the *Greenock and Wemyss Bay Railway*, all, or some of them, becoming afterwards its directors. The agreement would not, without more, have been binding on the *Greenock and Wemyss Bay Railway Company*, when incorporated; and therefore it was scheduled to the Act of Parliament which incorporated the *Greenock and Wemyss Bay Railway Company*, and a special clause (7) was inserted, reciting that:

An agreement had been entered into between the provisional directors of the *Greenock and Wemyss Bay Railway Company* and the *Caledonian Railway*

(1) Lord *Ormidale*.
(2) Scotch Reports, 3rd Series, vol. x. p. 893.
(3) 8 & 9 Vict. c. 33, s. 119.
(4) Sir *Richard Baggallay*.
(5) Mr. *Gordon*, Q.C.
(6) Lord *Cairns*.
(7) The 59th.

Company, in relation to the construction and the maintenance of the railway and other works by this Act authorized, the working and management of the traffic thereon, the fixing and apportionment between the said companies of tolls, rates, and charges, and other matters in connection therewith; and it is expedient that the said agreement should be sanctioned. The said agreement shall be, and the same is hereby sanctioned and confirmed, and shall be as valid and obligatory upon the company and the *Caledonian Railway Company* respectively, as if those companies had been authorized by this Act to enter into the said agreement, and as if the same had been duly executed by them after the passing of this Act.

Up to this point, the enactment does no more than give statutory validity to the agreement; but the clause proceeds in these words

And it shall be lawful for the company (that is, the *Greenock and Wemyss Bay Railway Company*) and the *Caledonian Railway Company* respectively, and they are hereby required, to implement and fulfil all the provisions and stipulations in the said agreement contained.

Now, my Lords, I apprehend it to be clear beyond the possibility of argument, that when an agreement between two companies who are coming for an Act of Parliament is scheduled to the Act of Parliament, and when an enactment is found in the body of the Act that each company shall be required to implement and fulfil all the provisions and stipulations in the agreement, every provision and stipulation in that agreement becomes as obligatory and binding on the two companies as if those provisions had been repeated in the form of statutory sections.

To find what is the provision contained in the statute with reference to the matter now under consideration we turn to the 18th clause of the agreement, which is as follows:—

All differences which may arise between the parties hereto respecting the true meaning or effect of this agreement, or the mode of carrying the same into operation, shall, from time to time, so often as any such questions or differences shall arise, be referred to arbitration in terms of the *Railways Clauses Consolidation (Scotland) Act*, 1845 (1).

I am at present addressing myself to the argument which was urged at the Bar, that there was in this case nothing more than one of those voluntary agreements or contracts to refer to arbitration, which, without more, would not exclude the jurisdiction of the Court. But it appears to me to be entirely a misapprehension to describe this as a voluntary agreement. It has become a statutory obligation. This 18th clause must now be read as if it were a

(1) 8 & 9 Vict. c. 33, s. 119.

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section of the Act, and as if the Act had said in so many words that all differences which may arise between the parties hereto respecting the true meaning or effect of this agreement, or the mode of carrying the same into operation, shall, from time to time, be referred to and settled by arbitration. It appears to me clear, beyond any doubt whatever, that we have here no room for the application of the doctrine which has so much occupied the attention of the Courts as to the effect of voluntary agreements, but simply to consider the case arising upon an Act of Parliament forcing the parties to have their disputes settled, not by the ordinary tribunals of the country, but by a reference to arbitration.

There remains the question, is the dispute which has arisen a difference between the parties "respecting the true meaning or effect of this agreement, or the mode of carrying the same into operation?" The *Greenock and Wemyss Bay Railway Company* were to make, and to be at all events the nominal proprietors of, their railway; but, when made, it was to be worked by the *Caledonian Company.* The *Caledonian Company* were to contribute £30,000 to a capital which was to amount in the whole to £120,000, and the remaining £90,000 was to be provided by the *Greenock and Wemyss Bay Railway Company.* In respect of their trouble and expenditure in working the railway, the *Caledonian Company* were, in the first instance, to have one-half (50 per cent.) of the gross earnings, to compensate them for the working expenses. The other moiety was to be placed in the hands of the proprietors of the line, the *Greenock and Wemyss Bay Railway Company*, and out of that other half, certain expenses connected with the maintenance of the line, and the maintenance of the *Greenock and Wemyss Bay Railway Company*, were to be deducted. Up to that point there is no dispute between the parties, and those deductions have from time to time been made in a manner against which no complaint is alleged. But then, over and above the capital of £120,000, the *Greenock and Wemyss Bay Railway Company* were to be allowed to borrow £40,000, and had what are called borrowing powers given to them for that purpose. Those borrowing powers were in substance an incorporation of the ordinary *Clauses Consolidation Act*, with which your Lordships are familiar. Mortgages of the undertaking were to be created, nor

was there any limitation whatever of the ordinary characteristics which borrowing powers possess.

The agreement went on provide that after the expenses to which I have referred were deducted, the net earnings were to be divided, three-fourths being received by the *Greenock and Wemyss Bay Railway Company* and one-fourth by the *Caledonian Railway Company.*

The difference which has arisen between the parties here is not respecting the true meaning or effect of this agreement, because the words of the agreement are clear and plain enough, but respecting the mode of carrying the agreement into operation, having regard to the paramount rights of the mortgagees which the Legislature has allowed to be created. The contract to refer to arbitration is clearly obligatory, and it is equally clear that a difference has arisen as to the mode of carrying the agreement into operation, and, if so, Parliament has ordered that it shall be referred to the decision of an arbitrator.

It appears to me that the action in the Court of Session is excluded by the 18th clause of the agreement, and therefore, concurrently with the Judges in the Court below, I humbly move your Lordships to dismiss this appeal with costs.

LORD CHELMSFORD:—

My Lords, my noble and learned friend has put the question before your Lordships so very clearly, that, agreeing as I do entirely with him, I do not think I can usefully add anything to what he has said.

LORD HATHERLEY:—

My Lords, I am of the same opinion.

LORD SELBORNE:—

I also am of the same opinion.

Interlocutor affirmed; and appeal dismissed, with costs.

Agents for the Appellants: *Grahames & Wardlaw.*
Agents for the Respondents: *Simson, Wakeford, & Simson.*

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MACBETH *et al.* . . . . . APPELLANTS;
ASHLEY *et al.* . . . . . RESPONDENTS.

Closing Hour of Public-houses—25 & 26 *Vict. c.* 35.

Eleven o'clock at night is the hour appointed for closing public-houses in *Scotland*, although in special cases, and for well considered reasons, a deviation is allowed with reference to "any particular locality" really requiring it.

An order by the magistrates of *Rothesay* for closing at ten, instead of eleven, though limited by its words to a "particular locality" embraced every public-house in the burgh:—

Held, by the House, agreeing with the Court below, that the magistrates' order was *ultra vires*.

THE four principal hotel-keepers of *Rothesay* asked from the Court of Session a decree rescinding and annulling a resolution of the *Rothesay* magistrates, passed on the 15th of April, 1872, whereby in effect they required that all the licensed publicans of the burgh should have their doors closed every night at ten o'clock, instead of eleven, the hour previously appointed and fixed by the general statutory rule throughout *Scotland*. The magistrates' resolution purported to be confined to "a particular locality" in the burgh; but it applied to all the public-houses of the place, numbering thirty-one. And the hardship was represented as serious, because, while the Legislature intended to give fifteen hours of each lawful day for the sale of excisable liquors, the magistrates of *Rothesay*, in this case, had reduced the allowance to fourteen hours, by accelerating the closing at night and leaving the opening of the morning unaltered.

The answer and defence of the magistrates was, that the resolution in question was passed by them in the exercise of an exclusive discretion conferred upon them by the House Statutes (1), a discretion not subject to the review or control of the Court of Session.

The Lord Ordinary (2), decided in favour of the magistrates, holding that the Court of Session "had no power and could not

(1) 9 Geo. 4, c. 58, 16 & 17 Vict. c. 67, and 25 & 26 Vict. c. 35.
(2) Lord *Gifford*.

be called upon to review their decisions." Against the Lord Ordinary's interlocutor the above Appellants reclaimed to the Inner House (First Division), who reversed the Lord Ordinary's interlocutor, and ordered that the word *ten* should be deleted and the word eleven substituted in the certificates to denote the hour of closing. In delivering his opinion on this occasion the Lord President *Inglis* adverted to the clause in the 25 & 26 Vict. c. 35, which provides that

> In any particular locality within any county, or district, or burgh requiring other hours for opening and closing than those specified in the forms of certificates, it should be lawful for the magistrates, as they should think fit, to insert such other hours.

With reference to this special proviso his Lordship made the following remarks, shewing its objects and the error of the magistrates:

> It was not the intention of the Legislature to give a power to magistrates to alter the hours of an entire county or an entire burgh, but only to exercise that power in any particular locality within a county, or within a burgh, the peculiarities of which might render it desirable that the hours should be earlier, because the magistrates had no power to make the hours later. They cannot make the opening later than eight, or the shutting later than eleven, which are the two hours prescribed in the schedule as a general rule. There are many localities where earlier hours are more desirable than in other localities. One can easily understand, for example, that in a mining district, where the workmen come up from their work generally at six o'clock in the morning, it is very desirable that they should have an opportunity of obtaining refreshment before they go to bed. But that is only one of a great many other instances that could be suggested where the particular kind of industry or occupation existing in a particular locality should make it desirable to have earlier hours than prevail in the county or burgh generally. Now, keeping these observations in view, let us see what it is that the magistrates of *Rothesay* have done. They seem to have been aware that they would have a difficulty in dealing with the words "any particular locality within any county or burgh;" and accordingly in carrying out their resolution to shut up all the hotels and public-houses in *Rothesay* at ten o'clock at night, they defined a certain part of the burgh, and made their new hours applicable to that part of the burgh only,—excluding another, but smaller part of the burgh. But then the line is so ingeniously drawn that in that part of the burgh to which the change of hours is made applicable, every hotel and public-house in the burgh is situated. So that in practical effect it is just the same thing as if they had come to a resolution that nobody in *Rothesay*, whether hotel-keeper, innkeeper, or public-house-keeper, should be allowed to keep his house open after ten o'clock. That is the practical effect; and the attempt to make this take the appearance of a provision for a particular

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locality is simply a mode of defeating the words of the Act of Parliament by an ingenious contrivance.

The magistrates appealed to the House of Lords, having for their counsel the *Lord Advocate* (1) and the *Solicitor-General* (2), who, relying on the 16 & 17 Vict. c. 67, as well as on the 25 & 26 Vict. c. 35, contended that these statutes nowhere limited the exercise of the magisterial power to any one portion of the burgh, and that they had authority to adapt the hours of public-houses to the requirements of each and every locality within it.

Mr. *Southgate*, Q.C., and Mr. *Kay*, Q.C., appeared for the Respondents, but were not called upon, the Law Peers at the close of the argument on behalf of the Appellants, delivering the following opinions:

THE LORD CHANCELLOR (3):—

My Lords, the question and the only question to be determined in this case is, whether an order made by the magistrates of the burgh of *Rothesay* was within the powers conferred upon them by the Act of Parliament under which they were proceeding; for if the order was within those powers, it was not for the Court of Session, and it is not for your Lordships, to examine into the discretion exercised by the magistrates. The exercise of that discretion is entirely for them, and for them alone.

The question, in the view which I should submit of it to your Lordships, turns really upon one Act of Parliament, the 25 & 26 Vict. c. 35. It is true that another Act, the 16 & 17 Vict., had been previously passed upon the same subject; but if your Lordships will turn to the Act of the 16 & 17 Vict., you will find that the form in which that enactment is couched is this—it gives in a schedule one form of certificate of licence to be granted to an hotel or public-house, and in that form there occurs the condition that the house is not to be opened before eight o'clock in the morning, or to be kept open later than eleven o'clock at night. And then the 11th section, after declaring that the magistrates

(1) Mr. *Gordon*, Q.C. (2) Mr. *Holker*, Q.C.
(3) Lord *Cairns*.

may grant a licence in the form to which I have referred, declares that:—

> In localities requiring other hours for opening and closing public-houses than those contained in the schedule, it shall be lawful for the justices or magistrates to insert in the schedule such other hours, not being earlier than six or later than eight o'clock in the morning for opening, or earlier than nine o'clock or later than eleven o'clock in the evening for closing the same.

The proviso, therefore, is a power given to alter or modify the particular form of licence contained in the schedule. But when your Lordships turn to the Act of the 25 & 26 Vict., you will find that the form of certificate given by the earlier Act is entirely swept away, and another form substituted for it. Therefore, the proviso in the earlier Act, which was to operate upon the form of certificate given in that Act, of necessity comes to an end when the certificate given by the earlier Act is removed out of the way. Without stopping to consider whether there are or are not actual repealing words in the later statute, and without stopping to consider what may have been the meaning of the proviso in the earlier statute, it appears to me sufficient to say that the certificate given in the earlier statute being now at an end, and being a certificate which cannot be granted, the earlier statute itself is no longer to be considered.

In this case the magistrates of *Rothesay* have made an order substituting an earlier hour for closing, instead of the hour specified in the later statute to which I have referred. They have done so, not for the whole burgh in point of form, but for a portion of the burgh, so far as regards metes and bounds; but the portion for which their order has been made is admitted to contain all the hotels, inns, and public-houses which exist in the burgh; and therefore, though in form the order does not extend to every square yard of the burgh, for the purposes of licensing it really does comprise the whole of it. This, indeed, was not denied at the Bar. It was very properly assumed to be an order which practically did affect, and (what is more important,) was meant to affect, the whole of the houses within the burgh which were to be licensed.

Now, bearing that in mind, let me direct your Lordships' attention to the provisions of the later statute, the 25 & 26 Vict.

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That later statute, in place of the one and only form of certificate contained in the schedule to the 16 & 17 Vict., provides, I think, three forms of certificates in the schedule. Each of those forms contains a condition that the house to which a certificate is to be granted shall not be open earlier in the morning than eight o'clock, or later in the evening than eleven o'clock. Those hours, therefore, are taken by the Legislature to be the hours which, as a general rule, are to be applied to all licensed houses. The 2nd section of the Act provides that these forms of certificates shall come in place of the forms of certificates provided by the earlier Act, and that it shall be lawful for the justices, "where they shall deem it inexpedient to grant to any person a certificate in the form applied for, to grant him a certificate in any other of the forms contained in the schedule." And then come these words:—

> Provided always, that in any particular locality within any county, or district, or burgh requiring other hours for opening and closing inns and hotels and public-houses than those specified in the forms of certificates in said schedule applicable thereto, it shall be lawful for such justices or magistrates respectively to insert in such certificates such other hours, not being earlier than six of the clock or later than eight of the clock in the morning for opening, or earlier than nine of the clock or later than eleven of the clock in the evening for closing the same, as they shall think fit.

Now if your Lordships take those words in the proviso as they are to be literally interpreted, it appears to be, beyond all doubt, that they point to a discretion reposed in the magistrates, which is to be exercised not with reference to the whole county, district, or burgh within their jurisdiction, but, as the words expressly bear, with reference to a particular locality within (that is inside of) the county, or district, or burgh; and I think your Lordships will easily see how reasonable and intelligible this provision of the Legislature is. The subject of the general hours for opening and closing public-houses is a matter, and has always been treated as being a matter, of great public moment. It has been treated as a matter to be reserved for and determined by the consideration of the Imperial Parliament. It has accordingly been a subject upon which Parliament has, in this Act, expressed its opinion with regard to what should be the general rule as to the hours mentioned in the certificate. But then the Act takes notice that in any particular district over which the licensing authority shall

exercise its power, there may be some reason why a portion of the district, or a locality within the district, should have applied to it a different rule from that which is to be the rule for the district at large; in other words, that there should be a power of making an exception from that which is to be the general rule. But that is to be the form in which the discretion is to be exercised. There is to be a general rule, and there may be an exception; but if the exception is to swallow up the rule it ceases of course to be an exception at all; and that which might fairly have been an exercise of discretion becomes no exercise of the kind of discretion mentioned in this Act of Parliament.

In his very clear argument the Lord Advocate said: "Here is a power, a discretion, given to the magistrates, to take a particular locality within their district, that is a discretion which they may exercise not only once but again and again; they may first take one locality and they may afterwards take another; and in that way they may traverse the whole of their district; why, therefore should they not take the whole of their district at once?" Now, my Lords, I will assume, though it is not for your Lordships now to decide, as the question has not arisen, that this may be a discretion which may be exercised more than once—that may be so, and upon that I express no opinion; but of this I am quite certain, that if magistrates under the guise of exercising a discretion had taken portion after portion of their district, not with reference to the particular wants or requirements of each portion, but in order by degrees to take possession of the whole district, and under the pretence of exercising a discretion for each portion had virtually subverted the general rule laid down by the Legislature; if I say your Lordships were to find, which I cannot imagine or suppose you ever would find, magistrates adopting that course for the purpose of doing, what I must describe as evading, an Act of Parliament, your Lordships would not be prepared to sanction, but would discountenance and prevent the exercise of a power so used. That, however, has not been done by the magistrates in this case; they have done that which they believed was within their power. They have, once for all, attempted with regard to all the public-houses in their district, to change the rule laid down by the Act of Parliament. That, in my

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opinion, is a power which has not been intrusted to them by the Legislature; and I, therefore, submit to your Lordships that the view taken by the Court of Session was correct, in reducing the order which was thus made by the magistrates.

I therefore propose to your Lordships that the interlocutors appealed against should be affirmed, and the appeal dismissed with costs.

LORD CHELMSFORD:—

Whatever may be the construction of the 16 & 17 Vict., we have nothing to do with it except as introductory to, and, in some respects, explanatory of, the Act of 25 & 26 Vict., which makes the intention of the Legislature perfectly plain by the introduction of these words "any particular locality within any county, district, or burgh." Upon these words there can be no doubt that even if the word "locality" in the 16 & 17 Vict. had the construction which was contended for, it has been altogether superseded by the later statute, and that the magistrates have not, as has been contended by the Lord Advocate, powers of licensing under 16 & 17 Vict., and also under 25 & 26 Vict. The magistrates have to deal with the latter statute only.

Now it may be conceded that this is a matter in the discretion of the magistrates in the proper exercise of their statutory powers; but upon this occasion, instead of confining themselves to a part of the burgh, they have endeavoured to apply their power to every part of the burgh—at all events to the part of the burgh containing all the public-houses to which their licensing powers extend, and therefore practically to the whole of the burgh. This appears to me to be contrary, not only to the spirit, but to the very letter of the Act; because it is impossible to say that the limits which they have defined can be called "a particular locality within any county, or district, or burgh;" and I must say it appears to me something very like an attempt to evade the Act of Parliament. Now, the law will not allow that to be done indirectly which cannot lawfully be done directly; and therefore I have no doubt whatever that this was *ultra vires* of the magistrates of the burgh.

I do not know whether it is important to consider the objection that the discretion of the magistrates can be exercised only

when other hours than those named in the certificate, are required for opening, as well as closing public-houses. The words "opening and closing" give the power as to morning and evening both; and it may well be that a change as to opening might, from particular circumstances, be requisite, and yet not as to closing; or *vice versa*. And although the times for opening and closing mentioned in the certificate comprehend a period of fifteen hours, there is nothing to indicate that in any change to be made those should be the exact number of hours for which publicans are to be allowed to keep open their houses.

I agree with my noble and learned friend, that the interlocutors ought to be affirmed and the appeal dismissed with costs.

LORD SELBORNE:—

My Lords, I am entirely of the same opinion.

With respect to the reasons on which the learned Lord Ordinary, who took a different view, proceeded, and with which Lord *Ardmillan* (1) appears to have been disposed to agree (although yielding to the authority of the majority of the Judges in the Inner House), they appear to me, my Lords, to turn upon a principle which it would be somewhat dangerous to encourage in dealing with Acts of Parliament of this description. Because, in the letter of the magistrates' order, less than the whole of the burgh is comprehended in point of territorial limits, their Lordships seem to have been inclined to think that the strict language of the Act of Parliament was satisfied, and that the Court, under those circumstances, ought not to interfere with the discretion of the magistrates. Now, I cannot but think that their Lordships may have lost sight of a distinction which exists between the evasion of an Act of Parliament passed in derogation or restriction of the legal rights and liberties of the subject, and the evasion of an Act which confers, for public purposes, powers that would not otherwise exist. It has been said, in this House and elsewhere, with regard to the Mortmain Acts (2), and others of that kind, which restrict previously existing legal powers, that a man is at liberty to evade them by keeping outside of them; but if

(1) See the opinions of the Scotch Judges, 3rd Series, vol. ii. p. 712.
(2) Black. Com. 509.

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you were to keep outside of an Act which creates for public purposes licensing powers in magistrates, it is manifest that you would not be acting in the exercise of those powers at all.

Without meaning to deny that it is confided to the discretion of the magistrates to determine what particular localities require other hours for opening and closing than those specified, it is obvious that such discretion as they have is not an arbitrary discretion to define any localities they please, but they must be such localities as they consider, in the honest and *bonâ fide* exercise of their own judgment, to *require* a difference to be made. The participle "requiring" is connected with the substantive "locality," and therefore it must be a requirement arising out of the particular circumstances of the place. The magistrates must, in the exercise of an honest and *bonâ fide* judgment, be of opinion that the "particular locality" which they except from the ordinary rule is one which, from its own special circumstances, requires that difference to be made. It is evident that the magistrates have not proceeded upon that ground in the present case; and therefore, without saying absolutely that no case could possibly be conceived in which there might happen to be only one or two public-house within the district, and those really so situated that a good reason could be given for applying the exception to them—without saying that such a case would be impossible, it is perfectly clear, and on all hands conceded, that such a case does not exist here.

Judgment of the First Division affirmed, and appeal dismissed, with costs.

Appellants' Agents: *Simson, Wakeford, & Simson.*
Respondents' Agents: *Grahames & Wardlaw.*

WATT . . . . . APPELLANT; 1874
LIGERTWOOD AND DANIEL . . . . . RESPONDENTS. *April* 21.

Contempt of Court—Imprisonment.

When a Judge, in the legitimate exercise of his jurisdiction, is defiantly disobeyed, he may commit the offender instantly to prison for contempt of Court.

Process-caption.

A document *in manibus curiæ* having been carried away by an agent regardless of the Judge's remonstrances:—

Held, that a process-caption was a proper remedy, and that notice of its issue was unnecessary.

THE Appellant, an advocate in *Aberdeen*, presented, on behalf of a client, a petition praying an interdict from the Sheriff against the sale of certain bathing machines. The petition was opposed. After hearing the Appellant and the agents of the other party, on the 19th of March, 1867, the Sheriff refused the interdict; but when he was about to have his judgment written out and signed on the petition, the Appellant laid hold of it, saying, "I withdraw the petition." The Sheriff thereupon told the Appellant that the petition could not be withdrawn, and ordered the Appellant to restore it to the clerk; intimating at the same time that disobedience to the order would be treated as "a contempt of Court." The Appellant nevertheless walked off, carrying with him the petition; whereupon the Sheriff informed the clerk that he (the clerk) would be held responsible for the recovery of the petition. The clerk, therefore, at once asked and obtained from the Sheriff a process-caption against the Appellant, and a sheriff's officer was despatched with it to get back the document or imprison the Appellant. When the Court functionary entered the Appellant's office and demanded the petition, the Appellant threw it into the fire. He was thereupon seized and lodged in prison, where he remained till the following day, when he was released.

The action was brought by the Appellant in May, 1867, against the Sheriff, the sheriff-clerk, and the sheriff-clerk-depute, concluding that the process-caption should be rescinded and annulled, and that the Defenders should be ordered to pay the Appellant

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£5000 for damages in respect of his imprisonment. The Lord Ordinary (1), on the 24th of November, 1870, dismissed the action, and his interlocutor was adhered to by the Second Division of the Court below, who decided, however, on the 28th of October, 1871, that "no expenses were due to either party;" their Lordships differing in their opinions as to the issue of the process-caption without notice.

Mr. *Watt* appealed to the House against the judgment of the Court of Session dismissing his action. The sheriff-clerk and the sheriff-clerk-depute also presented a cross appeal, complaining that costs had not been awarded to them (2).

Mr. *John Pearson*, Q.C., and Mr. *A. Robertson*, on behalf of the Appellant, contended that the document taken away in this case was not the property of the Court, but the private property of the Appellant; secondly, that a process-caption was an inappropriate remedy, which at all events ought not to have been issued without prior notice to the Appellant; and thirdly, that the Appellant was entitled to damages suitable to his professional status, which had been seriously affected by his imprisonment.

The *Lord Advocate* (3), and Mr. *J. T. Anderson*, who appeared for the Respondents, were not called upon to reply, their Lordships, at the close of the argument for the Appellant, delivering the following opinions:—

THE LORD CHANCELLOR (4):—

My Lords, by one of the practitioners in the Sheriff Court of *Aberdeen* an act was committed in the year 1867 which I am unable to describe in any other way than as a gross and unjustifiable contempt of Court. A document, which this House has held to be part of the process depending in the Court (5), and which was clearly in *custodiâ curiæ*, was carried away by the Appellant, in defiance of an express order from the Judge, and after distinct intimation had been given to the Appellant that if he removed

(1) Lord *Mackenzie*.

(2) The case, as decided in the Court of Session, is reported in the *Scottish Jurist*, vol. xliv. p. 241.

(3) Mr. *Gordon*, Q.C.

(4) Lord *Cairns*.

(5) *Weekly Notes*, 1870, p. 143; *Scottish Jurist*, vol. xlii. p. 475.

the document in question the act would be, and would be treated as, a contempt of Court.

On the part of the Appellant it is suggested that what the Court ought to have done was to issue a process-caption, with all the accompaniments by which it is ordinarily accompanied, and that he should have given notice to the Appellant for a certain number of hours before, requiring him to return the document, and stating that if he did not return it, a process-caption would issue. This process-caption is a proceeding applicable to cases in which a practitioner of the Court borrowing a document belonging to the Court gives a receipt for it, and is under an obligation to return it when called upon. In those cases notice must be given, there being no time originally fixed for the duration of the loan; and that notice must precede any process for the purpose of enforcing the return. But, my Lords, any proceeding of that kind would have been entirely inapplicable to the present case.

Well, then, what could the Judge do? In my opinion, treating this as he stated he would treat it, as a contempt of Court, he might have proceeded at once with the cognizance he had of the whole subject, and vindicated the dignity of the Court by ordering the offender to be committed without more, leaving the contempt to be purged in the usual way. But, my Lords, there were also two other courses, not differing very materially from that which I have mentioned, and each of them milder and gentler, which is described by Lord *Neaves* (1), who says that "it was competent to the Sheriff, within whose cognizance and in whose presence the Pursuer's proceedings took place, to have issued a summary order or warrant ordering the Pursuer to restore the petition, of which he so took possession, and, failing his immediately restoring the same, for his immediate imprisonment till that order was implemented."

Another course, and a not very dissimilar course, would have been to order the commitment of the Appellant until he had restored the document. The practical effect of that third course would have been very much the same as that of the second. It would have given Mr. *Watt*, in substance, the alternative of at once

(1) *Scottish Jurist*, vol. xliv. p. 241.

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restoring the document in place of going to prison. But it was the third course which the Judge, through his officers, adopted.

My Lords, without pursuing the case further, I only express my opinion that the Judge was entirely warranted in issuing this warrant or caption, and in my opinion the dignity of the Court would not have been vindicated if some proceeding of this kind had not been taken.

The case having come up to your Lordships' House in a former year (1), when nothing certainly fell from any of your Lordships that could have encouraged the continuance of this litigation, I greatly regret that so much time and so much money have been spent or wasted in these proceedings. Now, all that I can do is to advise your Lordships to dismiss the first appeal (that of the Appellant *Watt*) with costs, and on the cross appeal to reverse the interlocutor of the Second Division, that is, the interlocutor of the 28th of October, 1871, and in place of that to pronounce a judgment assoilzing the Defenders (the above Respondents) with expenses, and remit the case in that form back to the Court of Session.

LORD CHELMSFORD :—

In this case it is clear, in my opinion, that no notice or special warning of the caption was necessary.

The case was regularly before the Sheriff-substitute. A petition was presented for an interdict—a caveat had been previously lodged which was equivalent to the appearance of the Respondent upon that proceeding. The matter being before the Sheriff-substitute, he heard the agents of the parties, documents were produced before him, and he came to the conclusion that no interdict ought to be granted. I think that under those circumstances the Respondent was entitled to have a deliverance written upon that petition, and it appears that the Sheriff handed the petition to the clerk for the purpose of having his interlocutor written upon it. At that particular point Mr. *Watt* said, "I withdraw the petition," and the Sheriff (in his evidence), says, "When he (Mr. *Watt*) said *that*, I was proceeding to dictate the interlocutor."

(1) *Weekly Notes*, 1870, p. 143.

Mr. *Watt* then took up the petition from before the Clerk. Whereupon the Sheriff said, "You cannot withdraw it in that way, Mr. *Watt*;" but Mr. *Watt* persisted in keeping it. Then the agent on the other side said that the interlocutor had been given in his favour, and that he wished it recorded, and he objected to the withdrawal. But Mr. *Watt* said, "There will be no interlocutor; the petition is withdrawn." The Sheriff-substitute (in his evidence) says:

> Mr. *Watt* seemed excited, and he certainly was rude. I then said to him very seriously, "You will quite understand, Mr. *Watt*, that I desire the interlocutor now to be written upon the petition, and that I shall consider your preventing the clerk from doing it as a contempt of Court." Mr. *Watt* retained possession of the petition, I think he put it into his pocket, and he immediately left the room.

Now, can there be the slightest doubt that, under these circumstances, it would have been competent to the Sheriff-substitute to issue a warrant for the committal or imprisonment of Mr. *Watt* until he delivered back that petition? It hardly seemed to be denied in the course of the argument that the Sheriff-substitute might have proceeded in that way.

But then it is said that the Sheriff-substitute proceeded in an irregular way by issuing what is called a caption-process. Now the caption-process is adapted to a particular state of things, and it is regulated by an act of *sederunt* of the Court. An agent may borrow a process, from the clerk, and, when he borrows it, he gives what is called a borrowing receipt. After that he is lawfully in receipt of that process until it is demanded back from him; but when it is demanded back from him, if he does not deliver it, he is then illegally in possession of the process, and this caption-process may be issued against him. Now, it occurred to me in the course of the argument, that a person who is a wrongdoer from the beginning, as Mr. *Watt* was upon the present occasion, who was at all times in illegal possession of the process, was exactly in the position of a person who has the process under this borrowing receipt after it is demanded from him and he refuses to deliver it. Therefore it appeared to me that this caption-process was the proper proceeding against a person who had committed this wrongful act.

It was not only a wrongful but an unprecedented act, for none of

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the Judges nor anybody else, ever heard of anything of this kind before. Therefore the question was whether the caption-process was applicable to a new state of things. The Lord Justice Clerk was of opinion that this caption process might properly be issued under the circumstances; but perhaps the opinion of the Lord Ordinary is so tersely and so well expressed, that I may as well refer to it. He says:—

> The Pursuer further maintains, that the process-caption was illegally and incompetently granted for recovery of the petition, because he had never borrowed it or granted a borrowing receipt for it. It cannot surely be maintained that although a warrant or caption for the recovery of a process may be issued against an agent who has legally and in ordinary form borrowed it from the sheriff-clerk and granted the usual receipt for its return, and has failed to return it when required, yet that a warrant or caption cannot be issued against an agent for recovery of a process which he has illegally and improperly carried away. Such a proposition is, it is thought, wholly untenable.

Now, I do not think there is any magic in the term "caption-process;" but, most unquestionably, the process itself was such that the Sheriff-substitute had an undoubted right to issue it, to compel the delivery of that document, and Mr. *Watt* might have saved himself from imprisonment by delivering back the document. He knew perfectly well what the officer had come for. He had pretty good notice that he had come to demand back that document, and the officer could not have demanded it without having proper authority for doing so, which proper authority was the warrant with which he was entrusted. But Mr. *Watt* put the document in the fire. I think there can be no excuse whatever for his conduct. I quite agree with my noble and learned friend with regard to the mode in which he purposes to dispose of that part of the case, and I think that Mr. *Watt* ought to be made to pay the expenses.

Perhaps I ought to say a word, but only a word, with regard to Mr. *Ligertwood* being joined in these proceedings. It is said that he is answerable for the acts of Mr. *Daniel*, his depute (1), and that is founded upon the commission which he received, which says that he is, amongst other things, to do everything concerning the premises which any sheriff-clerk may lawfully do. He has power

(1) Mr. *Ligertwood*, the sheriff-clerk, had Mr. *Daniel* for his sheriff-clerk-depute.

also to appoint deputies in the said office, for whom he shall be answerable. What is his deputy to do? He is to do what the sheriff-clerk may do, that is to say, what he may lawfully do. This is alleged to be an illegal act on the part of the deputy, yet although he is only the deputy to do what the sheriff-clerk may lawfully do, it is argued that the sheriff-clerk is answerable for his unlawful acts. That is all that is necessary to be said. I do not think that Mr. *Ligertwood* ought to have been joined in this action at all, and I entirely agree in the conclusion at which my noble and learned friend has arrived.

LORD SELBORNE:—

My Lords, I also agree entirely with the motion of my noble and learned friend on the woolsack. It is some satisfaction, in a case depending upon the practice of the Scotch Courts, to know that your Lordships are only affirming the opinion of the Lord Justice Clerk and the Lord Ordinary; the two opinions which differed from them being, in some respects, I think, not absolutely consistent with each other (1).

Mr. Watt's appeal dismissed with costs. Respondents assoilzied with expenses, and cause remitted back to the Court of Session to proceed accordingly.

Agent for the Appellant: *James Dodds.*
Agent for the Respondent: *Burcells.*

(1) Lord *Selborne*, in the course of the argument as to notice, referred to the case of Chief Justice *Gascoigne*, who, without a moment's hesitation, and without any prior notification, sent the Prince of *Wales* instantly to the *Fleet Prison* for a contempt of Court committed *in præsentiâ;* the heir of the Crown submitting patiently to the sentence, and making reparation for his error by acknowledging it.

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April 24. JOHN JAMES DRYSDALE . . . . . RESPONDENT.

Claim of by-gone Teinds or Tithes—Defence—Bonâ fide perceptio et consumptio, Held sufficient.

A demand of thirty years' arrear of tithes was met by the plea of *bonâ fide perceptio et consumptio*:—

Held by the House (affirming the decree appealed from) that the defence was sufficient.

Per THE LORD CHANCELLOR (1):—Perception in good faith and in complete ignorance of any adverse title, is a sufficient defence against a claim for the recovery of by-gone teinds.

Per LORD CHELMSFORD:—I have no doubt whatever that the plea of *bonâ fide perceptio et consumptio* has been satisfactorily established.

Per LORD SELBORNE:—I cannot help regretting that the doctrine of *bonâ fide perceptio et consumptio*, which is shewn to be part of the law of *Scotland*, is not also, to an equal extent, part of the law of *England*. It seems, moreover, to be a principle especially applicable to a claim for a long arrear of teinds.

IN 1783 the Crown granted a lease, for £100 per annum, of the teinds and feu duties belonging to the Lordship of *Dunfermline*, to certain of the vassals thereof, upon trust for themselves and the other vassals. The lease commenced retrospectively in 1780, and expired on the 23rd of March, 1799; but was alleged to have been continued by tacit relocation till 1838; when it was put an end to, *except as to the teinds*, by an action of removing. From thenceforth the vassals paid their *feu duties* to the Crown, and not to the trustees under the lease.

In May, 1838, the Crown executed an inhibition of the teinds; but in consequence of a doubt as to the validity of that inhibition, no teinds were paid to, or claimed by, the Crown till 1871, when an information on behalf of Her Majesty was filed by the Lord Advocate against Mr. *Drysdale*, the above Respondent, as one of the vassals of *Dunfermline*, in respect of his estate at *Pitteuchar*, situated within the Lordship. The Crown claimed from him arrears of unpaid teinds from the year 1838, upon the allegation that the lease to the trustees was put an end to by the inhibition,

(1) Lord *Cairns*.

and that upon the termination of the lease the right to the teinds had reverted to the Crown.

Mr. *Drysdale* resisted the claim, contending, in the first place, that the lease still subsisted by tacit relocation; secondly, that the inhibition was not only ineffective, but that the Crown had acquiesced in Mr. *Drysdale's* possession without making any claim against him for teinds; and thirdly, that Mr. *Drysdale* had taken the entire rents and profits of his estate with a full conviction of his legal right to them, and without any intimation, or suggestion, or suspicion that the Crown could claim teinds against him.

The Lord Ordinary (1) gave judgment against Mr. *Drysdale* for payment of £1136 to the Crown in respect of the teinds claimed. Mr. *Drysdale* thereupon reclaimed to the Second Division of the Court of Session, who, on the 24th of February, 1872, recalled the Lord Ordinary's interlocutor; resting their decision on the special defence that the claim of the Crown was excluded by the perfect *bona fides* of Mr. *Drysdale's* possession; Lord *Benholme*, who delivered an elaborate opinion, declaring that "to sustain the plea of *bonâ fide* perception, a title merely colourable is sufficient." Mr. *Drysdale* was assoilzied with costs (2).

Against this judgment the *Lord Advocate* (3) and Sir *John Karslake*, Q.C. (having Mr. *J. T. Anderson* with them), were heard for the Crown. Mr. *William Pearson*, Q.C., and Mr. *Alexander Gibson* (Mr. *Rolland* with them), addressed the House for Mr. *Drysdale*, the Respondent.

The following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (4):—

My Lords, the object of the Crown in granting the lease in this case was to receive a fixed rent of £100 per annum, and so avoid the trouble of collecting feu duties and teinds from the several heritors and vassals. The feus and teinds were leased to the persons named "for themselves, and for behoof of all the other heritors and vassals of the lordship;" and the lessees were trustees for those heritors and vassals. According to the law of

(1) Lord *Ormidale*.
(2) 3rd Series of the Scotch Rep. vol. x. p. 49.
(3) Mr. *Gordon*, Q.C.
(4) Lord *Cairns*.

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Scotland the lease would not come to an end without some act done on the part of the lessor or lessee. Notice would have to be given beforehand in the absence of an agreement to terminate it; and if that notice were not given, the lease would glide into that condition of tenancy which we term in this country a tenancy from year to year, upon the terms of the original lease. All that the beneficiaries under this lease had to do was to wait until they were applied to by those who were their trustees. With the Crown they had no longer any reckoning.

In the year 1799 the lease passed into that state which is described by the law of *Scotland* as tacit relocation. No step was taken to put an end to it from 1799 until 1839; and in 1839 the Crown authorities, alleging that the reserved rent of £100 a year had not been paid to them from 1811 to 1839, made a demand upon the survivor of the lessees for the arrears of the £100 rent during the whole of that period.

In 1838 an action of removing was instituted as to the feu duties; but it only shewed that something had been done to enforce the feu duties, but that the teinds were to be left as before.

In the year 1839 an inhibition, the appropriate way of terminating the lease of teinds, was taken out, inhibiting the lessees from dealing with the teinds. That inhibition is now admitted to have been invalid, and it appears to me that it cannot aid the argument of the Crown, if indeed it does not aid the argument of the Respondent. If not seen by the heritors and vassals, it is of course immaterial. If seen by them, I think they also must be held to have had the means of knowledge that the inhibition was, as it is now admitted to have been, invalid, and therefore they were entitled to disregard it.

Then, my Lords, we find that the officers of the Crown were so much embarrassed in determining whether the relocation of this lease had been put an end to, and whether the lease itself as to the teinds had come to an end or not, that they took out a fresh inhibition on the 13th of March, 1871, which was duly executed, inhibiting the heritors from dealing with the teinds, and qualified in this way, that it was to be without prejudice to the earlier inhibition of 1838, which is now admitted to have been invalid.

The Crown, therefore, appears in the year 1871, to have been so persuaded that there was, to say the least of it, a colour of title on the part of the heritors, that they found it necessary to take the proper proceedings for giving to the heritors what we should call notice to quit.

It appears to me that this is an unusually clear case. The lease was running on by relocation, at least, to the year 1839. The steps taken at that time to terminate it by inhibition were ineffectual. The heritor remained in the belief that with the Crown he had absolutely nothing to do; that the question rested between him and the trustees; that it was for the trustees to come to him, and if they wanted a contribution to the rent, to ask for it. And that state of things is not changed until the year 1871, he having all the time been in perception of the teinds in perfect ignorance of the claim of the Crown.

Upon the law applicable to the case there is no doubt or dispute. The authorities (most of them in your Lordships' House (1)), clearly establish that perception in good faith, and in complete ignorance of an adverse title, will be a sufficient defence to any claim for the recovery of the back rents and profits.

I must therefore express my entire concurrence with the judgment of the Court of Session, and I shall humbly advise your Lordships to affirm the interlocutors and dismiss this appeal with costs.

LORD CHELMSFORD:—

My Lords, the only question in this case arises on the third plea for the Respondent, which rests upon the doctrine of *bonâ fide* perception. The interlocutor appealed against proceeds upon that alone. In my opinion, it was not competent to the Respondent to raise the entirely inconsistent question of tacit relocation, which is a denial of the right of the Crown to the teinds, the plea admitting the right, but alleging that it has been lost by delay.

As to the law with regard to the *bonâ fide* receipt of produce, in *Scott* v. *The Heritors of Ancrum* (2) it is laid down that "any

(1) 25 Feb. 1795, M. 15,700, *Scott* v. *Heritors of Ancrum*, Bell's Folio Cases, p. 152; *Carnegy* v. *Scott*, 1 Shaw's Appeal Cases, 114.

(2) Bell's Folio Cases, p. 152.

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title of possession sufficient to put the parties in *bonâ fide* to suppose that they were not liable to a claim of this nature, is always sustained as a valid defence against it." Now, in the present case there was unquestionably, at one time, a title under the lease of 1783; and that title was never put an end to to the knowledge of the Respondent, and for forty years the Crown abstained from making any demand of these teinds. That might reasonably lead the Respondent to believe that the Crown had no claim whatever to them. Then it would be rather hard upon the Respondent now to hold that he took these teinds, or retained these teinds *malâ fide*, because the consequence would be that he would have to pay the surplus teinds for a period of thirty years, whereas if he had been made acquainted with the termination of the lease in the year 1839 he would have immediately purchased the teinds on the terms allowed by the Scotch law—at nine years' purchase (1).

Under these circumstances I have no doubt whatever that the third plea in law of the Respondent was satisfactorily established, and I agree with my noble and learned friend, that the interlocutor should be affirmed.

LORD SELBORNE:—

My Lords, the facts which appear to me to be material for the decision of this case are, first, that the Respondent has since 1839 paid feu duties to the Crown; shewing therefore his knowledge that, as to feu duties, the lease had come to an end. Secondly, that the Crown during the same period, until 1871, never made any claim for the payment of teinds; and, therefore, never did any act manifesting its own view to be that the lease had come to an end as to teinds. And, thirdly, that by an admission in the cause agreed to on both sides, it is expressly acknowledged that the Respondent and his predecessors, until the commencement of this action, received and consumed the whole rents and profits in question, without being aware of the existence of this claim. That admission, therefore, must mean that, having regard to the antecedent facts, they had not become aware of any change in those facts, or their legal consequences, which would make them more liable to teinds than they had been during the currency of the lease.

(1) The Scotch Act of 1633, c. 19.

I am strongly under the impression that that admission alone might be enough to dispose of this case. The interlocutor brought by this appeal to your Lordships' House assumes that the true defence of the Respondents is founded, not on the continued existence of the lease as to teinds by a now subsisting relocation, but upon a *bonâ fide* belief in that title, and the consumption of rents and profits founded on that belief. And, my Lords, this I think is a clear inference, both from the admission assented to by the Crown, and from the other facts of the case, that whatever may have been the true effect of the settlement which took place between the trustees and the Crown, the Respondent was a perfect stranger to it, and in no way informed of it, except so far as he became aware that as to feu duties in some way or other the lease had come to an end.

Now the principle of the various cases which have been referred to as to the doctrine of *bonâ fide* perception seems to be not in any manner open to controversy; and, when Lord *Eldon* said in the *Queensberry* cases, that a person, who has been holding under a title liable to be set aside, is not chargeable with what in *England* we should call mesne profits, until he is shewn to be in *malâ fide*, his Lordship affirmed a rule which is not only shewn to be a part of the law of *Scotland*, but I cannot help regretting that it is not also, to an equal extent, part of the law of *England* (1). It is a principle which throws the *onus probandi*, generally speaking, on those who repel it; and, as far as I understand the cases, there seems to be authority for stating that it is a principle especially applicable to a claim for a long arrear of teinds. Then is it possible to draw from the receipt of feu duties alone the inference which is desired by the Appellant? It is not, and cannot be denied, that it is possible for a lease of two subjects to be deter-

(1) Lord *Brougham* much regretted that the doctrine as to *bonâ fide perceptio et consumptio* was not part of the English law (1 Macq. 479). But equity recognises it. Thus "in cases of adverse possession, where there is no trust, no infancy, no fraud, no suppression,—where, in short, there is a mere *bonâ fide* possession, it is not according to the course of the Court of Chancery to carry back the account beyond the filing of the bill." *Per* Lord Justice *Turner* in *Hicks* v. *Sallitt* (3 De G. M. & G. 813). See *Seton* on Decrees, 3rd Ed. pp. 643 and 1396. The Scotch law assumes that *Conscientia rei alienæ* is awakened by the complainant's action.—*Erskine's* Institutes, p. 238.

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mined, as to one of those subjects, in a variety of ways, while it continues to subsist as to the other of them by relocation or otherwise. Wherever there is a lease for a term which has run out, no steps having been taken to determine it by notice, there is a legal presumption in favour of relocation—perhaps I ought to go further, and say that relocation takes effect by force of law. That being so, it is plain that persons in the position of the Respondent, being beneficiaries under this lease, would have a right *primâ facie* to presume its continuance, and would not be thrown on proof that they were ignorant of its determination.

My Lords, I entirely agree in the motion made by my noble and learned friend.

Interlocutor affirmed, and appeal dismissed with costs.

Agent for the Appellants: *Horace Watson.*
Agent for the Respondent: *William Robertson*

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June 22.

SIR CHARLES MORDAUNT, BART. . . . APPELLANT;
SIR THOMAS MONCREIFFE, BART. (AS LADY MORDAUNT'S GUARDIAN *ad litem*) . . . RESPONDENT.

Divorce against a Wife—Her Insanity no Bar.

4 PD 73.
5 PD 143, 145, 146
6 PD 43.

A petition for divorce against a wife was met by an allegation of her insanity and consequent inability to defend herself. The Court below appointed a guardian *ad litem* on her behalf. Upon a verdict of her insanity, proceedings were suspended; but with liberty to the husband to apply again to the Court in the event of her recovery. The husband appealed to the House of Lords, insisting that the wife's insanity ought not to bar, or impede, the investigation of the charge of adultery brought against her. The House adopted this view; and, reversing the order appealed against, sent the case back with directions to proceed.

Divorce on behalf of an insane Husband or Wife.

Per LORD CHELMSFORD:—The question whether proceedings for the dissolution of a marriage can be instituted *on behalf* of a lunatic husband or wife, it is unnecessary to determine, as it involves considerations very different from those which occur in the *Mordaunt* case.

Opinions of the Consulted Judges as to Divorce in Cases of Insanity.

Chief Baron *Kelly*, Mr. Justice *Denman*, and Mr. Baron *Pollock* concurred

in holding that divorce may be asked and decreed on behalf of, or against, a lunatic, the Court appointing a guardian *ad litem* for protection; but Mr. Justice *Keating* and Mr. Justice *Brett* were of opinion that the insanity of either husband or wife is an absolute bar to divorce.

Adultery not a Crime.

By the law of *England* adultery, though a grievous sin, is not a crime;—and the analogies and precedents of criminal law have no authority in the Divorce Court, a civil tribunal.

Per LORD HATHERLEY:—In the proceedings against a criminal, every step is arrested by his or her becoming a lunatic. But the procedure in divorce is not a criminal proceeding.

AT *St. John's Episcopal Church, Perth,* on the 6th of December 1866, Sir *Charles Mordaunt,* the above Appellant, was married to Miss *Harriett Sarah Moncreiffe,* daughter of Sir *Thomas* and Lady *Louisa Moncreiffe,* of *Moncreiffe,* in *Scotland.*

A petition, charging Lady *Mordaunt* with adultery, and praying a dissolution of this marriage, was presented by Sir *Charles Mordaunt* to the Divorce Court on the 28th of April, 1869. Two days afterwards, on the 30th of April, 1869, the citation was duly served on Lady *Mordaunt,* whose solicitors entered an appearance for her; but on a representation, supported by affidavit, that she was insane, the Court, on the 27th of July 1869, appointed the above Respondent, her father, to act for her Ladyship as Guardian *ad litem.*

Upon the plea of Lady *Mordaunt's* alleged insanity, issue was joined; and the question was tried by a special jury, who, on the 25th of February, 1870, found that Lady *Mordaunt* "was, on the 30th of April, 1869" (the day on which the petition for divorce had been served upon her), "in such a state of mental disorder as to be unfit and unable to answer the Petition, and to duly instruct her attorney for her defence; and that she had ever since remained and still remained so unfit and unable."

On the 8th of March, 1870, Lord *Penzance* ordered that "no further proceedings should be taken in the suit until Lady *Mordaunt* recovered her mental capacity;" adding that "Sir *Charles Mordaunt* should be at liberty to apply to the Court when able to affirm her recovery."

Against this order Sir *Charles Mordaunt* appealed to the Full Court of Divorce; and on the 2nd of June, 1870, Lord *Penzance*

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and Sir *Henry Singer Keating* affirmed Lord *Penzance's* order of the 8th of March, 1870; Lord Chief Baron *Kelly* dissenting.

On the 12th of March, 1872, Dr. *Harrington Tuke*, M.D., having made an affidavit that the recovery of Lady *Mordaunt* had become hopeless, Sir *Charles Mordaunt* applied to the Court to dismiss his petition for divorce so that he might appeal to the House of Lords; Lord *Penzance* having stated that he should do what might be necessary to facilitate this step, and thereby open the real question requiring adjudication. His Lordship accordingly, at the request of Sir *Charles Mordaunt's* counsel, dismissed the original petition, "without prejudice to the petitioner's right of appeal" (1). In April 1872, Sir *Charles Mordaunt* presented his appeal to the House of Lords; and Sir *Thomas Moncreiffe*, as guardian *ad litem*, was ordered "to put in his answer thereunto," which he did in due form.

On the 1st of July, 1873, the Case came on for argument at the Bar of the House, the following Common Law Judges attending to assist, namely: Lord Chief Baron *Kelly*, Mr. Baron *Martin*, Mr. Justice *Keating*, Mr. Justice *Brett*, Mr. Justice *Denman*, and Mr. Baron *Pollock*.

Sir *George Jessel*, Q.C. (2), Dr. *Spinks*, Q.C., Mr. Serjeant *Ballantine*, and Mr. *Inderwick*, appeared as counsel for the Appellant. They insisted that the whole matter was governed by the Act of Parliament establishing the Divorce Court (3). Having regard to the express provisions of that statute, the insanity of Lady *Mordaunt* formed no bar to the prosecution of the Appellant's suit; for if he could prove her adultery he would have an absolute right to a decree dissolving the marriage.

Dr. *Deane*, Q.C., Mr. *H. Giffard*, Q.C., and Mr. *Searle*, for the Respondent, urged that the statute conferred no jurisdiction to dissolve a marriage whilst either of the parties was of unsound mind; that by the 32 & 33 Vict. c. 68, the Respondent in a divorce suit was entitled to give evidence as a witness, but this right could not be exercised by a lunatic; that the strict examination of conduct imposed as a duty on the Court could not take place if either

(1) Law Rep. 2 P. & M. 112. (2) Then *Solicitor-General*.
(3) 20 & 21 Vict. c. 85.

party was insane; and finally, they maintained that the decision of Sir *Cresswell Cresswell* in *Bawden* v. *Bawden* (1) was an express authority against the appeal.

At the close of the argument, on the motion of Lord *Chelmsford*, the following question was propounded for the opinions of the Judges: "Whether, under the statute 20 & 21 Vict. c. 85, proceedings for the dissolution of a marriage can be instituted or proceeded with, either on behalf of or against a husband or wife who, before the proceedings were instituted, had become incurably lunatic?"

The Judges asked time for consideration before delivering their opinions; which, accordingly, were not given until the succeeding session; when, on the 15th of May, 1874, Mr. Baron *Martin* having retired from the Bench, the following consulted Judges thus respectively addressed the House:

MR. JUSTICE BRETT:—

The statute 20 & 21 Vict. c. 85, states in the preamble that it is expedient to amend the law relating to divorce, and to constitute a Court with authority in certain cases to decree the dissolution of a marriage. The 22nd section seems to imply that, in the enforcement of the new right, the means provided by the statute, with all the careful safeguards thereto attached, shall be the only means available. If those means are not applicable to a given case, it would be a violation of the 22nd section to say that the Court might proceed according to the principles and rules of the old Ecclesiastical Courts in analogous cases. And if the principles and rules of the Ecclesiastical Court are thus specifically ousted, how can it be fairly inferred that the principles or rules of any other Court are to be introduced? Can there be any other fair inference than that the procedure of this statute, and that only, is to be applicable to the new right? If this be so all the arguments founded on analogous cases fall.

Now, the arguments urged at the Bar on behalf of the Appellant were that the right to a decree is given to the husband on proof of adultery by the wife; and that it is an absolute right. On the other side it was insisted that the procedure given by the statute is inapplicable, for the Court cannot under the circumstances inquire into the matters of recrimination, connivance, or condonation, into which it is bound to inquire, because such an inquiry may require an examination of the insane Respondent, which cannot be obtained. Upon these arguments the real question seems to be whether the statute does give a procedure which is applicable; for the argument seems wholly untenable, that if a right be given without an adequate procedure being enacted, a remedy must be invented.

(1) 2 Sw. & Tr. 417; 31 L. J. (P. M. & A.) 94.

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It seems to me that the reciprocity of charge and countercharge is made so necessary a part of the procedure, that the Court of Divorce cannot pronounce a decree where that procedure cannot be followed out. The Court cannot pronounce a decree on the mere affirmative case of the Petitioner, *i.e.*, on mere proof of adultery. The Court is bound by sects. 29, 30, and 31 to inquire even of its own accord into and to determine upon the negative propositions forced on it by those sections (1). Those negative propositions cannot be inquired into by any other means than by counter-statement made by the Respondent in the suit. Such counter-statement cannot be brought forward without either the personal statement or instructions of the Respondent. No one else can from the nature of things have knowledge of the necessary facts.

This construction of the statute is, moreover, affirmed both by Sir *Cresswell Cresswell* and Lord *Penzance*. Both on a review of the statute itself and on the high authority of the two eminent persons who for so long presided in the Divorce Court, I am of opinion that the procedure instituted by the statute itself cannot be applied whilst the Respondent in a suit for a dissolution of marriage is insane. The truth is that the case of insanity of the parties at the time of charge and inquiry was overlooked. There are acts specifically required to be done by a Petitioner which make the procedure more clearly in language inapplicable to the case of an insane Petitioner. I, therefore, answer your Lordships' question by saying that in my opinion proceedings for the dissolution of a marriage cannot be

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(1) The sections are the following:—

Sect. 29: Upon any petition for the dissolution of a marriage, it shall be the duty of the Court to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or no the Petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same; and shall also inquire into any countercharge which may be made against the Petitioner.

Sect. 30: In case the Court, on the evidence, shall not be satisfied that the alleged adultery has been committed, or shall find that the Petitioner has, during the marriage, been accessory to or conniving at the adultery, or has condoned it, or that the petition is presented in collusion with either of the Respondents, then and in either of such cases the Court shall dismiss the said petition.

Sect. 31: In case the Court shall be satisfied on the evidence that the case of the Petitioner has been proved, and shall not find that the Petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the Respondents, then the Court shall pronounce a decree declaring such marriage to be dissolved: provided always, that the Court shall not be bound to pronounce such decree if it shall find that the Petitioner has during the marriage been guilty of adultery, or if the Petitioner shall, in the opinion of the Court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.

proceeded with either on behalf of or against a husband or wife whilst such person is insane.

MR JUSTICE KEATING :—

My Lords, by analogy to criminal proceedings, I see no reason why a citation should not be served upon the lunatic in order that the Court may have the fact of lunacy suggested on his or her behalf, and if necessary ascertained by a jury upon issue taken upon it, as was done in the present case.

The more difficult question, however, is how far those proceedings can or ought to be continued against a person incurably insane when the fact of such insanity has been legally ascertained. To decide this question rightly it seems to me important in the first place to consider how far the charge of adultery is in the nature of a criminal, or of a civil proceeding, and for that purpose to see what was the state of things before the *Divorce Act* passed. Now the jurisdiction which before the Act could only be exercised by Parliament in proceedings by bill for pains and penalties is that which the statute transfers to the Court of Divorce, and as it seems to me it still remains in the nature of a criminal proceeding.

Can it be contended that when a bill of pains and penalties was introduced into your Lordships' House to discrown and degrade Queen *Caroline* by dissolving her marriage with her husband on the ground of adultery, such a proceeding was a civil suit? yet it was not in strict technicality criminal, not being by way of impeachment; and I submit that every bill passed by the Legislature dissolving the marriage of the most ordinary person on the ground of adultery was not less a bill of pains and penalties than that introduced against Queen *Caroline*. Since, then, the transfer of the jurisdiction to a lower Court does not alter its character, it seems to follow that a suit for a divorce upon the ground of adultery is essentially in the nature of a proceeding *in pœnam*, but whether not being so in the strict technical sense, it can be said with propriety that lunacy could be pleaded, or operate as an absolute bar, is scarcely material to determine, if the Court ought to stay the proceedings as in the present case, which appears to me to be the proper course to pursue by analogy to the cases where an accused person is found to be unable to plead.

With respect to the construction of the statute itself as justifying the order made in the Court below, I will not by a repetition of the reasons I have already given in that Court, weaken the effect of the lucid, and, as it seems to me, conclusive judgment of Lord *Penzance*, to which I venture to direct your Lordships' attention (1). The statute does not give to every man who can prove his wife's adultery the right to a divorce. It enables every man in such a case to file his petition for a divorce, but the decree for it can only be made where the Court has satisfied itself of the preliminary matters mentioned in the 29th, 30th, and other sections of the Act, which distinctly impose upon the Court the obligation to make such inquiries.

The authorities are not numerous; but all that do exist are against the arguments put forward at the Bar on behalf of the Appellant. In the case of *Bawden* v. *Bawden* (2), which is a distinct authority upon the point, Sir *Cresswell Cresswell*

(1) Law Rep. 2 P. & M. 103, 109, 382.

(2) 2 Sw. & Tr. 417; 31 L. J. (P. M. & A.) 94.

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took time to consider, and although he had not the advantage of hearing counsel, and although the Respondent is said to have been a pauper, yet all who knew that learned Judge know that he never would have made the order he did except upon mature conviction that it was right, and I believe there is no case to be found in which either in the Spiritual Courts or in Parliament, proceedings have ever been continued against a lunatic respondent.

But your Lordships' question also refers to the case of a lunatic Petitioner,—can a lunatic petition for a divorce? Now looking to the words of the statute, it is difficult to suppose the Legislature ever contemplated a lunatic being a Petitioner. And here I would venture to suggest that the cases of *Hancock* v. *Peaty* (1), *Barheim* v. *Barheim* (2), *Beaumaine* v. *Beaumaine* (3), and *Parnell* v. *Parnell* (4), cited in the judgment of the Lord Chief Baron in the Court below, being all cases either of suits for nullity or judicial separation before the Act, can have no application to a proceeding for dissolution of marriage, which is altogether the creation of the statute. In proceedings, therefore, for a divorce under the Act in question its provisions are to be observed, and not the rules or principles of the Ecclesiastical Courts, which had no jurisdiction in the matter. In the case of *Woodgate* v. *Taylor* (5), a judicial separation was decreed by Sir *Cresswell Cresswell* upon the application of the committee of a lunatic on the ground of the wife's adultery. Now as the adultery was proved, there is no reason stated in the report, which is very meagre, why the proceeding should not have been for a divorce, if such could have been obtained, but it is explained in a note, by which it appears that the committee petitioned the Lords Justices to refer it to the Master in Lunacy to report upon the expediency of proceeding for a divorce. The Master in Lunacy, however, reported that it was not expedient to proceed for a divorce but for a judicial separation, and that report was confirmed by the Lords Justices. Although certainly not clear upon the point, yet it is not improbable the distinction I have alluded to was present to the minds of the Master and the Lords Justices, especially as the application by the committee was for a divorce and not for a judicial separation.

I answer your Lordships' question therefore by saying, that in my opinion proceedings may be instituted, but not continued against a lunatic after the lunacy has been duly found, and that a lunatic cannot be a Petitioner for a dissolution of his or her marriage.

LORD CHIEF BARON KELLY:—

My Lords, several points have been made on behalf of the Respondent, but upon the argument before your Lordships they seem to have resolved themselves into three. First, that this suit is a criminal proceeding, or analogous to a criminal proceeding, and so by law cannot be carried on against one who is disabled by insanity to understand the charge, or to plead, or to instruct an attorney or counsel, or to make a defence. Secondly, that it is so obviously unreasonable and unjust that one so incapacitated should be proceeded against for adultery, and convicted, and her marriage dissolved, that it cannot have been intended or contem-

(1) Law Rep. 1 P. & M. 335.
(2) 1 Hagg. Con. 5.
(3) 1 Hagg. Con. 498.
(4) 2 Hagg. Con. 169.
(5) 30 L. J. (Ecc. C.) 197.

plated by the Legislature that the Act of Parliament should authorize such proceedings while such incapacity exists. And, thirdly, it is insisted that upon the true construction of the Act of Parliament itself it confers no such authority.

Now as to the doctrine of analogy. I apprehend that this is no case of analogy at all. I am not aware of any species of suit or action known to the law, of which the incidents are to be determined by its analogy to criminal or civil proceedings. This proceeding is either a criminal prosecution or a civil suit. If a criminal prosecution, it can neither be instituted nor carried on while the accused is lunatic. If it be a civil suit, lunacy is no bar. The Act confers no criminal jurisdiction whatsoever on the Court of Divorce. It has no jurisdiction at all to deal with articles upon the office of the Judge promoted, or otherwise to entertain a suit *in pœnam* for adultery, or for any other cause. Nor is authority wanting upon this point. In *Rigault* v. *Gallisard* (1), Chief Justice *Holt* expressly takes the distinction between proceeding civilly for a divorce (in the Court spiritual for adultery) and criminally or *in pœnam*, for punishment; holding that "because no indictment lies at Common Law" (for adultery) "therefore they proceed below either civilly, that is to divorce the husband and wife, or criminally, because the parties were not criminally prosecuted above." While, therefore, a criminal prosecution is instituted in the name of the Crown representing the public, and involves no question of property or damages, and although promoted by a private prosecutor, is under the control of the Crown, by the Attorney-General, this petition is essentially and exclusively of a civil character, preferred by one private individual against another, over whom the Crown has no control, and is a suit in which the judgment may be not merely for dissolution of marriage, but for civil damages against a co-Respondent. If, indeed, it were possible to treat the case as one of analogy, it is enough to say that while the law is now settled that no indictment lies for adultery, an indictment does lie for libel, and for assault, and for other causes, for which a civil action for damages is maintainable, and yet it has never been suggested that lunacy is a bar to any such action. So also with respect to bankruptcy, which certainly partakes more of a criminal character in its nature, incidents, and consequences than a suit for divorce, it has been held on the high authority of Lord *Eldon* that a trader, though lunatic, is liable to a commission or adjudication in bankruptcy.

The argument next to be considered is founded upon the alleged unreasonableness and injustice of a suit for a dissolution of marriage against one who is incapacitated by insanity to make a defence. My Lords, it cannot be doubted that the evils are great and manifold, which may result from a decision either way on this question, upon which, nevertheless, your Lordships must pronounce your decision one way or the other. If a petition of this nature be dismissed for this cause, the consequences to a Petitioner may be that although he may have evidence incontrovertible of the adultery of his wife, and a just claim to damages against a co-Respondent to a large amount, he finds himself, without any fault of his own, and from an accident which he had no power to prevent, tied and bound to an adulterous wife for the rest of his life, compelled by law to maintain her suitably to his own condition and rank and fortune, liable to the risk of spurious issue, his legitimate children or natural heirs despoiled of property,

(1) Holt, 50, 51.

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as by the wife's claim to dower, or to personalty passing to her if he should die intestate, and himself for ever precluded from contracting marriage with another woman. On the other hand, if a Petitioner be permitted to proceed, the consequences may be scarcely less calamitous to the wife, it may be, an innocent wife, in a case in which, more than in any other judicial inquiry, evidence may be given against her which she alone may be able to contradict or to explain away; and after a trial upon which, but for her insanity, she might have established a complete defence, she may recover her reason only to find herself dishonoured and disgraced for ever by a sentence of divorce for adultery.

It appears to me that the whole question to be decided, all important as it is, is simply one of construction, and depends entirely upon the language of the statute. If the statute confers no power upon the Court to pronounce for a divorce while the Respondent is insane, or invests the Court with a discretion upon this subject, the judgment below must be affirmed. But if the statute not merely authorizes, but expressly and imperatively requires the Court to decree a dissolution of marriage, where facts are found to exist which may be, and are offered to be, established in this case, although subject to certain exceptions which are plainly and expressly enumerated in the Act, but which must be assumed not to exist in this case, I apprehend that a Court of Law has no choice and no discretion, but must obey the Act of Parliament, and proceed to try the cause, and if the charge be established, pronounce the decree which the Act requires.

Now, my Lords, permit me to bring before your Lordships the very words of this Act of Parliament. By sect. 27, after certain provisions touching a judicial separation and alimony, it is enacted, that "It shall be lawful for any husband to present a petition to the said Court praying that his marriage may be dissolved on the ground that his wife has since the celebration thereof been guilty of adultery." Here the Petitioner has presented such a petition on the ground and in the terms prescribed by the Act. Further, the Act requires that "Every such petition shall state as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded." Here the Petitioner has so stated the facts required, and strictly complied with the Act of Parliament. By sect. 28, "Upon any such petition presented by a husband, the Petitioner shall make the alleged adulterer a co-Respondent to the said petition." The Petitioner in this case has so made two persons named as the alleged adulterers co-Respondents to the said petition. The 28th section further enacts, that "The parties or either of them may insist on having the contested matters of fact tried by a jury." The Petitioner here, by his counsel at the Bar, does so insist. The 29th section expressly enacts, that "Upon any such petition for dissolution of a marriage it shall be the duty of the Court to satisfy itself, so far as it reasonably can, as to the facts alleged." Upon this petition the Petitioner, by his counsel at the Bar, now prays of your Lordships to perform this duty, or to direct that it shall be performed, and the Act of Parliament obeyed. And then by sect. 31, "In case the Court shall be satisfied on the evidence that the case of the Petitioner has been proved, then the Court *shall* pronounce a decree declaring such marriage to be dissolved." Now, my Lords, I may assume that the Petitioner is in a condition to prove the facts which he has alleged to the satisfaction of the Court, and so entitle himself to the decree which the Legislature has thus enacted, that "the Court *shall* pronounce," and I would then venture to ask, with all respect to the majority of the Court below—What power or right has any Court of Law

in this country, without the authority of Parliament, to interpose in a suit thus instituted a prohibition to the suitor to proceed further; to refuse to receive evidence of facts, as to which the Legislature has declared that it shall be its duty to satisfy itself, and that if satisfied it shall pronounce a decree; and having thus denied to the suitor a right expressly granted to him by Act of Parliament, proceed at once to dismiss the suit.

5 PD 147

The alternative question propounded by your Lordships, whether a petition for a dissolution of marriage can be preferred on behalf of a lunatic husband or wife? seems to me to involve many considerations essentially different from those which arise in the present case. For in the latter case the committee or guardian has no choice or discretion, but is bound to make the best defence he can to repel the charge and resist the suit; but in the case of a lunatic husband or wife complainant, and where a suspicion of adultery by the wife or husband arises, it may well be that the complainant, if sane, might be unwilling to institute a suit; and the greatest caution and deliberation should, therefore, be exercised before such a proceeding is adopted; but I think that, as matter of law, a committee or guardian may lawfully sue by petition under the Act, though I am also decidedly of opinion that no such step should be taken except under the authority of the Court of Chancery, wherever from the nature of the case and its circumstances the sanction of the Court can be obtained.

For these reasons, I am of opinion that proceedings for a dissolution of marriage on the ground of adultery may be instituted and carried on on behalf of or against a husband or wife incurably lunatic, and that consequently the judgment of the Court below dismissing the petition should be reversed.

My learned brothers *Denman* and *Pollock* instruct me to say that they fully concur in the opinion which I have had the honour to express to your Lordships.

The case was set down in the Minutes of the House of Lords for final judgment on the 22nd of June, 1874; when the following opinions were delivered by the Law Peers:—

LORD CHELMSFORD:—

My Lords, it is very much to be regretted that this question, which is of such painful interest, and which so nearly concerns the most important and intimate domestic relation, should have led to a difference of opinion not only in the Court below, but also amongst the learned Judges who were summoned to assist your Lordships upon the hearing of the appeal. I cannot forbear, also, to lament the loss of my noble and learned friend, Lord *Colonsay*, who was present during the argument at your Lordships' Bar, whose long judicial experience and sound judgment would have greatly aided us in our deliberations, and have added weight to our decision.

The question your Lordships are called upon to determine is one

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which in the particular case, whichever way it is decided, necessarily involves the most painful consequences, and your decision will establish for the future whether any effect upon suits to be instituted for the dissolution of marriage for adultery is produced by the circumstance of the alleged guilty party having afterwards unhappily been visited with incurable lunacy. In considering this question, it is almost impossible to repress the feeling which arises upon a view of the evils which must attend a decision either way, or to restrain the mind from receiving a bias from such extraneous considerations. They can only be effectually resisted by keeping steadily in view that the solution of the question submitted by your Lordships to the Judges, "Whether, under the statute 20 & 21 Vict. c. 85, proceedings for the dissolution of a marriage can be instituted or proceeded with either on behalf of or against a husband or wife who before the proceedings were instituted had become incurably lunatic?" depends solely and entirely on the construction of the statute.

In confining our attention strictly and exclusively to the Act, it becomes unnecessary to consider (as some of the learned Judges have done) whether proceedings for a divorce are of a civil, or criminal, or *quasi*-criminal nature. No aid to its construction can be obtained by determining the exact character of the proceedings, nor from analogies derived from considerations applicable to cases of these different descriptions respectively. It is only necessary to bear in mind that the Act gives a right not previously existing to obtain the dissolution of a marriage for adultery, by the decree of a newly-created Court of Law, and from its provisions alone we must learn the conditions upon which the jurisdiction is to be exercised.

In construing the Act, it would not be correct to argue, from the seeming hardship of instituting or continuing a suit for a divorce against a lunatic, that it cannot be supposed that the Legislature could have intended to allow a petition to be presented in such a case. This would not be construction, but conjecture. To sustain an objection to such a suit, it must be shewn, not that the Act contains in it nothing to sanction the proceedings, but that by express words or necessary implication it prohibits them. Mr. Justice *Brett*, in the opinion which he delivered to your Lordships,

stated that the incapacity of making a defence which arises from the lunacy of the Respondent creates an invincible impediment to a proceeding under the Act. He said: "It seems to me that the reciprocity of charge and countercharge is made so necessary a part of the procedure, that the Court of Divorce cannot pronounce a decree where that procedure cannot be carried out." I confess that I do not quite comprehend this proposition, which is expressed in the most general and unqualified terms. If in cases where there is a countercharge, and the party who would have preferred and proved it is incapacitated from doing so by unsoundness of mind, the procedure of charge and countercharge cannot be carried out, must it therefore follow that in every petition against a lunatic, without exception, even in cases where there is no ground for any countercharge, the mere existence of a right under the Act to make one must have the effect of preventing a decree being pronounced? And even where there exist grounds for a countercharge, why should it be assumed by the learned Judge that in all cases the lunacy of the Respondent would prevent the procedure being carried out? The incapacity of the Respondent may occasion the loss of an important witness, but it is very possible that the countercharge may be capable of being established by other evidence. It might have been reasonable and proper for the Legislature to protect a lunatic in every case from the institution of proceedings for a divorce, but this does not warrant the conclusion that it has done so.

Great stress has been laid on the judgment of Sir *Cresswell Cresswell* in the case of *Bawden* v. *Bawden* (1), and of Lord *Penzance* in the present case, as proceeding from Judges of the highest authority, and more particularly conversant with the procedure of the Divorce Court. But as the question before your Lordships depends entirely upon a judicial construction of an Act of Parliament, those eminent Judges cannot derive any peculiar advantage from their experience of the practice in that Court.

Turning, then, to the Act as the only guide to a determination of the question raised by the appeal, I proceed to consider whether there is anything to be found in it which can warrant the Court in dismissing summarily a petition for a divorce which is regular

(1) 2 Sw. & Tr. 417. 8 Jur. N.S. 187.

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in every respect, both in form and in substance, upon the ground that the Respondent may be disabled from fully meeting the charge of adultery, or of encountering it by the best evidence of a countercharge by reason of her state of incurable lunacy.

By the 27th section of the Act a husband is empowered to present a petition to the Court for the dissolution of his marriage on the ground of his wife's adultery, stating in his petition the facts on which his claim to have the marriage dissolved is founded. And by the 29th section the Court is to satisfy itself, so far as it reasonably can, as to the facts alleged, and whether the petitioner has connived at or condoned the adultery, and also to inquire into any countercharge which may be made against the petitioner. By the 31st section the petitioner is absolutely entitled to a decree (the words being, "the Court *shall* pronounce a decree declaring such marriage to be dissolved"), unless any of the Acts mentioned in the proviso are proved against him. By this proviso the Court is relieved from the obligation of pronouncing a decree (the words are shall not be *bound* to "pronounce such decree"), if it find that the petitioner has been guilty of adultery or has been guilty of unreasonable delay in presenting or prosecuting his petition, or of cruelty towards the other party, or of having deserted or wilfully separated from the other party without reasonable excuse before the adultery, or of such wilful neglect or misconduct as has conduced to the adultery. These are the only grounds upon which by the Act the Court is not *bound* to pronounce a decree, and from the wording of the proviso it must be taken that if none of the specified Acts are proved against the petitioner, he is absolutely entitled to a decree. But to these the decree appealed from has virtually added these words: "The Court shall not be bound to pronounce such decree if the Respondent has become incurably lunatic before the suit was instituted."

It may undoubtedly be a great hardship and misfortune that a person accused of adultery should be unable to defend himself or herself by his or her own testimony, or to prove matters of recriminatory defence which may be peculiarly within his or her knowledge, although there must be very few of the countercharges specified in the Act in which other evidence would not generally be capable of being produced. It is enough, however, to say that

the Legislature has not thought proper to provide for such a case. Either the possibility of its occurrence did not suggest itself to the framers of the Act, and so no provision was made for it, or if it did, they did not consider that it ought to be a ground for staying the proceedings. What the Legislature has not expressly enacted the Judges ought not to presume that it intended, and upon that presumption to add an implied ground for the dismissal of a petition to those expressed in the Act.

After the most anxious and careful consideration, and with no other doubt than that which has been occasioned by the opinions of the learned Judges which are opposed to mine, I think that there is nothing in the Act of Parliament to prevent proceedings for the dissolution of a marriage for adultery being instituted or proceeded with, where the party proceeded against has, before the institution of the proceedings, become incurably lunatic.

The alternative question submitted to the Judges, whether proceedings for the dissolution of a marriage can be instituted on behalf of a lunatic husband or wife, is unnecessary to be determined, and as it involves considerations very different from those which apply to the case where the Respondent is a lunatic, and as there may be conditions annexed by the Act to the presenting a petition for a divorce with which a lunatic may be unable to comply, I should not like to express any opinion without hearing a fuller argument upon the question than was necessary upon the hearing of this appeal.

I think that the decree appealed from should be reversed, and that the case should be remitted to the Court for Divorce and Matrimonial Causes, with directions to restore the petition presented by Sir *Charles Mordaunt*, and to hear and determine the matters of the said petition, and to pronounce a decree upon the same.

LORD HATHERLEY :—

My Lords, this very painful case has occasioned much diversity of opinion on the part of the learned Judges by whom it was originally decided, and also on the part of those whose advice and assistance your Lordships have requested, in order the better to enable the House to arrive at a sound conclusion. This conflict

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of opinion is not surprising, seeing that the Court whose jurisdiction and procedure are in question, was created only a few years ago, and that until that time the dissolution of the marriage union was unknown to our law, and could be effected only by special legislation in each case.

The question immediately before us is this: Can a husband prosecute a suit in the Divorce Court created by the 20 & 21 Vict. c. 85, after it has been ascertained in the progress of the suit, and in this case before any answer put in, that the principal Respondent, his wife, is afflicted with incurable insanity, and that such insanity existed before the institution of the suit, and has continued to the period when the discussion of the question arose. It is important to state clearly the exact question, which resolves itself simply into one of jurisdiction; namely, whether the Court constituted by the 20 & 21 Vict. c. 85, has jurisdiction to try the question raised by the petition of the husband, as between him and his wife, the wife being insane. Other questions might be raised if the trial had taken place and the adultery of the wife had been proved before she was deprived of reason; but it appears to me that any argument in support of the present appeal founded upon the assumed adultery of the Respondent, is out of place, the preliminary question being whether any trial of that fact can, under the circumstances, be had in the Divorce Court.

The learned Judge Ordinary, on a suggestion made on behalf of the wife before answer put in, that she was incompetent to make her defence owing to her insanity, directed by an order of the 27th of July, 1869, that Sir *Thomas Moncreiffe* should appear as her guardian *ad litem*, solely for the purpose of formally raising the question of insanity. He accordingly entered an appearance for her in that capacity, and an issue was directed, which resulted in the jury finding her to have been of unsound mind at the time of the citation on the petition having been served on her, and from thenceforth up to the time of their verdict. The Judge Ordinary, upon this finding, stayed proceedings in the suit until the Respondent should recover her mental capacity, with liberty for the husband to apply in that event. The husband appealed from this decision to the full Court, and the matter was fully argued before the Judge Ordinary, the Lord Chief Baron, and Mr. Justice *Keating*,

when the original order was affirmed, the Lord Chief Baron dissenting from the judgment of the Court.

It was afterwards arranged that an order should be made conclusively stopping the suit (it being admitted that the insanity of the Respondent had become permanent), and the present appeal from that order has been presented to your Lordships' House by the husband;—the guardian *ad litem* appearing on behalf of the Respondent (the wife).

Your Lordships requested the attendance of the learned Judges on the argument of the appeal, and submitted to them the following question:—"Whether, under the statute 20 & 21 Vict. c. 85, proceedings for the dissolution of a marriage can be instituted or proceeded with, either on behalf of or against a husband or wife who, before the proceedings were instituted, had become incurably lunatic?" One of the learned Judges then present, Sir *Samuel Martin*, has since retired from the Bench, and we have lost the great advantage of his formally delivered opinion; but it has been intimated to us that he concurred in the opinions of the three learned Judges forming the majority, who in this case have answered your Lordships' question in the affirmative. Two learned Judges have given their opinion that proceedings against a wife cannot be proceeded with whilst she is insane, which is, in truth, the only question in the present case.

It is much to be regretted that your Lordships have been deprived, by the death of Lord *Colonsay*, of the opinion of one whose judgment, from experience, I have found to have been always of the greatest assistance. I cannot, indeed, consider the point now raised to be one free from difficulty. I do not, however, feel such a degree of doubt as would justify me in suggesting to your Lordships a further argument in this already painfully protracted case.

It is agreed by all the parties to this appeal, and by those who have had judicially to investigate the point before us, that it must be determined by the construction of the statute which created the new jurisdiction, for the tribunal itself and this particular portion of its jurisdiction are entirely new. Marriage was indissoluble except by death until the passing of the Act before us. It is true that the Legislature had for a long period before the passing of that

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Act passed special Acts, expressed to be on the petition of the injured husband, or (in rarer cases) of the wife; and it was usually expressed that the Sovereign, compassionating the condition of the Petitioner, had assented to the special Act by which the tie was dissolved on proof of adultery, and subject to certain conditions and provisoes with reference to the property of the parties, but each Act of Parliament was passed on full examination of all the circumstances and the special merits of the case.

In consequence of the report of a Royal Commission, the Legislature was induced to pass the Act of the 20 & 21 Vict. c. 85, constituting a Court to which all matrimonial causes were transferred from the Ecclesiastical Courts; and in addition a husband, and (in certain cases) a wife, might have a readier and cheaper remedy by a petition in respect of the dissolution of marriage on the ground of the adultery of the Respondent than could be had in Parliament.

The Court was constituted as follows: The Lord Chancellor, the three Chiefs and the three Senior Puisne Judges of the three Common Law Courts, and the Judge of the Court of Probate (to be called the Ordinary), were made the Judges. By the original Act (sect. 10) all suits either for dissolution or nullity of marriage, and all applications for new trials were expressly directed to be heard and determined by three or more Judges of the Court, of whom the Judge Ordinary should be one, in contrast to all the other matters entrusted to the same Court by the preceding section, which might be heard and determined by the Judge Ordinary alone. By a subsequent Act (23 & 24 Vict. c. 144) the Judge Ordinary had conferred on him all the powers of the full Court.

By the 22nd section of the original Act, this new Court was, as to procedure, to follow the Ecclesiastical Court in all cases "other than those to dissolve any marriage." Upon any petition for the dissolution of marriage it was declared (sect. 29) to be the duty of the Court to satisfy itself, "so far as it reasonably can," not only as to the facts alleged, but also as to connivance and condonation; and the Court was also directed to inquire into any counter charge against the Petitioner. Very full powers are conferred on the Court for directing and trying issues (sect. 40) and examining

witnesses (sects. 46, 47), and its decrees and orders are to be enforced in the same manner as those of the High Court of Chancery (sect. 52). The Court has the power of making rules and regulations as to procedure (sect. 53), and appeals are given to the full Court and to the House of Lords. The Court is made a Court of Record. There is also a special power (sect. 42) of serving petitions abroad or dispensing with service altogether; and the Court may make rules for this purpose, with all the powers conferred on the Court of Chancery for the like purpose.

Now I have enumerated these various enactments because I find it difficult to concur in that part of the very able opinion of Mr. Justice *Brett* in which he holds that there is an omission to arm the Court with powers sufficient to reach the present case. I apprehend that a new Court established as a "Court of Record," with power to "hear and determine" the matters referred to it, and armed also with all the powers and authorities enacted in this Act, of examining witnesses, directing issues, and enforcing its orders, must be taken to have full jurisdiction over all the subjects of the Queen within the realm without distinction, and that any exception from such jurisdiction must either be found in express words contained in the Act, or inferred by way of clear deduction from some of its provisions or omissions.

It is for this reason that great stress has been laid in the Court below, as well as in some of the opinions delivered in your Lordships' House, on the supposed incompatibility of the enactments with the supposition of any principal Respondent, or, indeed, any Petitioner, being a lunatic, or a person incapable from insanity of acting on his or her own behalf. The 41st section, for instance, is pointed out as regards the Petitioner, which requires him or her to verify the petition by affidavit. But be it observed that this section applies to petitions in suits for nullity, judicial separation, or jactitation of marriage, as much as to those for divorce *à vinculo*. Now the suits for nullity, judicial separation, and jactitation of marriage had long been cognizable in Ecclesiastical Courts; and suits for nullity, as in the *Portsmouth Case* (1) often proceeded on the insanity of him who applied for a decree. All these are now transferred to the new Court, and are directed by the 22nd section

(1) 1 Hagg. Eccles. Rep. 355.

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of the Act to be conducted as heretofore with regard to procedure, and this 41st section cannot be taken to have stayed such suits from proceeding by the simple fact of requiring an affidavit, which, in the *Portsmouth Case* for instance, could not have been made.

But then it is said that the 21st section directs the Court to inquire as to connivance or condonation, and also into counter-charges against the Petitioner, and by the following section the Court is required, on proof of connivance, condonation, or collusion in the suit, to dismiss the petition. Much stress has been laid upon these directions, and it is said that the inquiry into such matters cannot properly be conducted where one of the persons best informed upon them is incapable of understanding or answering any question. I think that these observations may be justly made, as pointing out the hardship and risk of injustice when proceedings are carried on against a person of unsound mind; but such hardship or risk of injustice might equally occur by the absence, or death, or lunacy of a witness; and these considerations do not lead to the necessary inference that lunatics are not within the purview of the Act. Power is expressly given to the Court to proceed, even after dispensing with service of the petition on the Respondent (sect. 42); and though one of the learned Judges in the Court below remarked that the Court would in that case have been satisfied, doubtless, that the party was in some way cognizant of the petition, yet the objection would remain that the Court would not obtain the information in his or her absence which the objection I am observing upon supposes to be essential.

But it is said that neither the Act nor the Rules (which have legislative authority) provide for the conduct of suits either by or against lunatics, although provision is made for the guardianship *ad litem* of minors. But I conceive that every Civil Court that has power to "hear and determine" and to make rules for its procedure has necessarily power to appoint guardians for persons incapable of defending suits on their own behalf, and that the inference does not arise that a lunatic is excluded from the Act because no special reference is made to his or her mode of defence. In the suits previously conducted in the Ecclesiastical Courts, and in all other Courts exercising civil jurisdiction, a power has been held incident to the existence of the Court of proceeding against

Defendants or Respondents of unsound mind, and, as a consequence, a power of appointing a guardian *ad litem* to defend them or to proceed in their behalf. This new Court, then, constituted as a Court of Record to hear and determine upon a new class of rights, must, I apprehend, have all the same powers with reference to procedure that any other Court possessing civil jurisdiction can exercise, unless by the Act it is forbidden to exercise them. By the 22nd section of the Act, for instance, the cases of divorce *à vinculo* are expressly excepted from the procedure of the Ecclesiastical Court. This is an exclusion in the particular case of a mode of procedure not satisfactory to the Legislature in that case; but can it be said that any other procedure is excluded? The wide terms of the 29th section, directing the Court to satisfy itself, "so far as it reasonably can," upon the several matters of the petition; and the collateral inquiries directed by the Act, must, in my opinion, be held to authorize every mode of conducting a suit incident to a Court having judicial authority to determine it, and not forbidden by the Act. The appointing of a guardian *ad litem* to an insane Defendant appears to me to be a power necessarily incident to the inquiry positively ordered by the Act.

Much has been said, both in the Court below and before your Lordships, as to the analogy of the suit for a divorce to a criminal proceeding, and it has been inferred, that inasmuch as every step in the proceedings against a criminal is arrested by his or her becoming lunatic, so by parity of reasoning lunacy should bar all procedure against a Respondent in a divorce case. But the procedure in divorce is not a criminal procedure. It is true that the consequences of a divorce may be far more severe than those in any merely civil suit, but it is consequentially only that this result takes place. The divorce bills in Parliament were not bills of pains and penalties. They proceeded on the ground of relieving the petitioner for the bill from his unhappy position, that of indissoluble union with one who had herself, as far as was in her power, broken the marriage tie. The remedy applied was simply dissolution of the tie. No ordinary Divorce Act punished the adulterous party personally, or inflicted any pecuniary penalty. They usually, indeed, debarred the woman of dower and thirds, but that consequentially, because she ceased to be the wife; and, on the

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same grounds, they usually required the husband to give up his marital rights in the wife's property. The new Court was instituted to administer the same relief in the same manner. The co-Respondent, that is, the person charged with adulterous intercourse with the wife, is indeed subjected to what is in effect a fine, but even that is given in the character of damages.

In those cases of civil injuries which, as in cases of libel, might also be the subject of indictment, the civil Court is not on that account stayed in its proceedings on an action against a lunatic.

The Judge Ordinary justly observes that a divorce bill was treated by the House of Lords "rather as a matter of general morals, as laying the foundation for a measure of grace, than a mere investigation of delinquency drawing after it an absolute right to redress. The entire conduct of the husband was submitted to review; the complaints and excuses of the wife, however guilty, were entertained; and the bill, which passed only if the case were in all respects meritorious, was liable to be defeated in its last stage if the husband failed to restore an adequate part of the fortune, if any, that his wife had brought to him (1)." This is a correct description of the procedure by bill in Parliament, and it is evidently not a penal procedure, but a procedure for the necessary adjustment of the civil rights of the parties consequent on an alteration of their status.

But it is stated that the change of status is in itself penal. No doubt the consequences of the change are in most cases very severe. In many others the dissolution of the one marriage is immediately succeeded by the marriage of the divorced wife with the adulterer. But however this may be, the Divorce Acts did not proceed penally. The whole of the new procedure seems to me to be constructed on the principle of passing over to the new Court all the powers of procedure formerly exercised by Parliament in the matter. If we look to the character of the Court and of the high functionaries who constitute it, the reference to the execution of its orders and decrees, which is to follow the course of the Court of Chancery, the direction that suits may proceed without even service of the petition, if the Court shall so direct, the power of examining the parties now given by recent statute—every enact-

(1) Law Rep. 2 P. & M. 127.

ment indicates an analogy to civil and not criminal process. The Court of Chancery, of course, has no difficulty in enforcing its orders against lunatics, and the orders of the Divorce Court are to be enforced in like manner.

I have purposely abstained up to this point from considering the question of hardship. Such a question can only arise in case your Lordships should be of opinion that hardship and injustice would be inflicted to such an extent by construing the Act as affecting lunatics, that Parliament cannot be conceived to have intended to include them within the jurisdiction of the new Court; and it may be said that Parliament may more reasonably be taken to have reserved to itself the power of dealing with so special a case as that of lunacy on the part of the husband or wife. I think this proposition not in itself probable when we look to the eminence of the persons selected to preside in the Court. But, further, I think it not a legal presumption, where we are dealing with an Act which lays down special and guarded limits as to the mode in which the jurisdiction is to be exercised, and does not expressly restrict the ordinary power, which I conceive to exist in every civil Court, of dealing with lunatic parties to a litigation.

Here, too, it may be justly added that certain cases are specified in which to decree a divorce is not competent to the Court, others in which it may be refused if the Court think fit; and such provisions do not include that of either party being lunatic. If the suit must cease at the moment of either party becoming lunatic, then it would be stayed even after a finding of the adultery, should the reasoning from criminal procedure prevail.

It does not appear, indeed, that any case can be found in which Parliament has granted a divorce when either party has been a lunatic; neither has any case of refusal on that ground been found; and I think the cases are not so numerous in which lunacy after adultery takes place as to justify the House in considering that procedure of the new Court should on that account be stayed as inconsistent with the previous course in Parliament.

If the Legislature be taken to have purposely omitted all mention of lunacy one way or the other, I think the inference is that they have not prohibited ordinary procedure of a civil court in such a case.

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As regards the hardship, it is certainly greater on the part of the wife than on the part of the husband; for if your Lordships should hold the case to be excepted from the 20 & 21 Vict. c. 85, there is nothing to prevent the husband from obtaining a private Act. Such Acts have been several times passed since the Act constituting the Divorce Court, when peculiar cases have arisen. I have seen myself in your Lordships' library two such Acts; one (Dr. *Cashel's* case) of the 29th and the other (Colonel *Thomson's* case) of the 30th year of the Queen, passed in the month of April 1866 and 1867 respectively. But the wife could not, of course, be replaced in her original status if your Lordships erroneously held her to be subject to the jurisdiction of the Court, and the Court should dissolve the marriage. But yet if Parliament would allow the husband to apply for an Act (and I cannot think they would refuse), the friends of the wife have as ample means of fully bringing out the truth of her case before one tribunal as before the other, and the hardship really is, that whether in Parliament or before the Court, the lunacy under which she labours must be detrimental to her interests in this great crisis of her life in a far higher degree than in other matters concerning her position or property.

I ought not to omit noticing the case of *Bawden* v. *Bawden*. The decision there adds the weight of Sir *Cresswell Cresswell's* opinion to that of the minority of the Judges in the present case, and of the Judge Ordinary. I admit that weight, and regard his judgment as worthy of all respect; but where no argument can be had on one side the weight of all decisions must be greatly impaired.

On the whole I do not think that this case can be more fully investigated. It was fit that it should be most amply discussed, but I conclude as I began by stating that I should not feel myself justified in further protracting the inquiry, and I concur, therefore, in the vote proposed by my noble and learned friend.

Ordered and adjudged, that the said Decrees or Orders of the Court for Divorce and Matrimonial Causes, of the 8th of March, and 2nd of June, 1870, and the 12th of March, 1872, complained

of in the said appeal be reversed; and that the cause be remitted back to the Court below, with directions to restore the Petition presented by Sir *Charles Mordaunt*, and to hear and determine the matter of the said Petition, and to pronounce a decree upon the same.

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Solicitor for the Appellants: *Benjamin Hunt.*
Solicitors for the Respondents: *Benbow & Saltwell.*

SIR J. E. ALEXANDER *et al*. . . . . APPELLANTS;
JOHN KIRKPATRICK . . . . . RESPONDENT.

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Conveyance of Heritage—Indispensability of the word "dispone" (1).

Per THE LORD CHANCELLOR (2):—Looking to the unanimity prevailing in the Court below, looking to the decisions which from time to time have been pronounced, and the *dicta* which have fallen from Judges in *Scotland* upon the subject; looking also to the expressions of text writers as evidencing the constant practice of the profession, it would be impossible now to open or disturb the rule as to the absolute necessity of having the word "dispone" in a conveyance of heritable property.

An invalid Instrument of Conveyance cannot revoke a valid one.

Per THE LORD CHANCELLOR:—The second deed being inefficacious as a conveyance, it appears to me to be entirely inoperative as a revocation. No case can be produced where, either in *Scotland* or in *England*, a mere alternative inconsistent disposition, not valid in itself, has been held to revoke an earlier and effective disposition of the same property.

Intention to revoke: the only receivable Evidence.

Per LORD HATHERLEY:—The Court can discover an intention to revoke only in the altered disposition. If the altered disposition fails, the revocation must likewise fail.

THE late Mr. and Mrs. *Kirkpatrick* having eight daughters and but one son (the above Respondent), executed, on the 18th of June, 1866, a joint deed whereby they conveyed and *disponed* in

(1) But see 31 & 32 Vict. c. 101, s. 20 (1868). *Alexander* v. *Kirkpatrick* was not within the statute.

(2) Lord *Cairns*.

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favour of themselves, as husband and wife and the survivor of them, all their property, heritable and moveable, real and personal. The deed contained provisions for the eight daughters, but was absolutely silent as to the son, now an advocate practising at the Scotch Bar in *Edinburgh*.

As the property affected by this deed consisted mainly of heritable estates in *Lanarkshire*, to which Mrs. *Kirkpatrick* had succeeded as heiress-at-law, the instrument reserved to her a power of revocation.

Nine months afterwards, on the 4th of March, 1867, the spouses executed a second deed, "giving, granting, and assigning," but not *disponing*, to trustees, the property in question. This second deed contained no revocation of the first deed (that of the 18th of June, 1866), and made no allusion to it.

The chief objects of the trust were to pay to Mrs. *Kirkpatrick's* husband, in case of his survivance, the free income of the estates, and to convey the fee after the wife's death to four of her daughters, burdened with annuities of £100 per annum to each of the other four daughters, and also to her son on the death of his wife.

Mrs. *Kirkpatrick* died on the 10th of November, 1867. Her husband also died on the 10th of February, 1871. He left his son an annuity of £200 a year.

On the 13th of February, 1872, the son, as heir-at-law of his mother, commenced the action in the present case, praying a judicial declaration that the deed of the 18th of June, 1866, "was effectually revoked by the deed of the 4th of March, 1867, but that the said deed of the 4th of March, 1867, although effectual as a revocation, was ineffectual as a conveyance of heritable property, and consequently that the succession to such heritable property had fallen to and devolved upon the pursuer."

The trustees appeared as defenders, and on the 20th of July, 1872, the Lord Ordinary (1) found that, inasmuch as the dispositive clause of the deed of the 4th of March, 1867, did not contain the word *dispone*, it was ineffectual as a conveyance of heritable property; but that it nevertheless operated as a revocation of the

(1) Lord *Jerviswoode*.

previous deed of the 18th of June, 1866; thus leaving the succession open to the Appellant, the heir-at-law.

Against this interlocutor the trustees reclaimed; and the cause was heard before the Judges of the first division, assisted by three Judges of the second (1). The decision ultimately pronounced was simply an adherence to the Lord Ordinary's interlocutor—two of the Judges (Lord *Deas* and Lord *Benholme*) dissenting from their brethren on the question of revocation (2).

Under these circumstances the trustees appealed to the House

(1) The authorities cited in the Court below with reference to the word *dispone* were the following:—Stair, 14, 2, 3; Erskine, iii., 8, 20; Bell's Prin. sect. 1692; Moore's Notes, i. 158; Sandford on Heritable Succession, 56, 61, 65; *Mitchell* v. *Wright*, 1759, M. 8082; *Ogilvy* v. *Mercer*, 1793, M. 3336; *Simpson* v. *Barclay*, 1752, 5 Br. Sup. 794; 1 Ross. L. C. 1; *Stewart* v. *Stewart*, Nov. 16, 1803; Hume, 881 (note *per* Baron *Hume*); *Hamilton* v. *Macdowal*, March 3, 1815 F. C. (*per* Lord *Meadowbank*); *Howden* v. *Glassford*, July 7, 1864, 3rd Series, vol. ii. 1317, *per* Lords *Curriehill* and *Deas*; *Hardy's Trustees*, May 13, 1871, 2nd Series, vol. ix. 736.

The authorities cited in the Court below with reference to the question of revocation were the following:—Pothier, Pandectæ, xxvii. sects. 2 and 3; *Coutts* v. *Craufurd*, March 14, 1806, 2 Bligh's App. 605; 5 Pat. App. 73; 1 Ross, L. C. 617; *Rowan* v. *Alexander*, Nov. 22, 1775, 5 Br. Sup. 423; Hailes, 695; 2 Bligh's App. 922; 1 Ross, L. C. 653; *Mure* v. *Mure*, June, 1, 1813, F. C. June 9, 1818, 6 Pat. App. 339; *Duke of Roxburghe* v. *Wauchop*, Dec. 13, 1816, F. C., H. of L. May 25, 1820, 3 Bligh's App. 630; 2 Sh. App. 619; 6 Pat. 548; 1 Ross, L. C. 659; Ersk. iii. 8, 98; Lord *Ivory's* note, Bell's Com. i. 96; Bell's Prin. 1812; *Wilson* v. *Henderson*, Jan. 31, 1797, M. 15,444, H. of L. March 29, 1802, 4 Pat. 316; 1 Ross. L. C. 594; *Dundas* v. *Dundas*, May 21, 1783, 1 Ross, L. C. 667 and 724; *Leith's Trustees* v. *Leith*, June 9, 1848, 10 D. 1137; *Purvis's Trustees* v. *Purvis's Executors*, March 23, 1861, 23 D. 812; *Somerville and Others* (*Richmond's Trustees*) v. *Hunter and Winton*, Nov. 25, 1864; *McEwan* v. *Dunn's Trustees*, March 27, 1865, in H. of L. as *Barstow* v. *Black and Others*, July 23, 1868; Law Rep. 1 H. L., Sc. 392; *Sibbald's Trustees* v. *Greig*, Jan. 13, 1871; *Leith* v. *Leith*, June 19, 1863, *Thomas* v. *Tenant*, Nov. 12, 1868; *Powell* on Devises, i. 600 (*Jarman's* ed.); *Williams* on Executors (6th ed.), i. 142; *Onions* v. *Tyrer*, 1 Eq. Ca., 1 P. Wms. 343; *Earl of Ilchester*, May 21, 1803, 7 Ves. 372 (Sir W. Grant, 378); *Grant* v. *Stoddart*, Feb. 27, 1849, 11 D. 860, H. of L. June 28, 1852, 1 Macq. 165; *Millar* v. *Marsh*, July 8, 1853, 15 D. 823; *Montgomery* v. *Fowles*, June 9, 1795, 2 Bell's Fol. Ca. 203; 1 Ross, L. C. 7; *Henderson* v. *Selkrig*, June, 10, 1795, M. 4489; *Cunninghame* v. *Whitefoords*, June 10, 1748, M. 16,119, 5 Bro. Sup. 423; *Neilson* v. *Stewart*, Feb. 3, 1860, 22 D. 646; *Brack* v. *Hogg*, Feb. 25, 1831, 5 W. & S. 61; *Willoch* v. *Ochterlony*, Dec. 14, 1769, M. 5539; Sandford on Succession, p. 77; Bell's Prin. 1938–9; McLaren on Wills, i. 475–8. See 3rd Series of the Court of Session Cases, vol. ii. p. 551.

(2) See 3rd Series, vol. ii. p. 551.

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of Lords, having for their counsel Mr. *John Pearson*, Q.C., and Mr. *Balfour* (of the Scotch Bar).

The *Attorney-General* (1), and Mr. *John McLaren* (of the Scotch Bar), were heard for the Respondent.

The following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (2):—

My Lords, looking to the unanimity prevailing in the Court below, looking to the decisions which from time to time have been pronounced, and the *dicta* which have fallen from Judges in *Scotland* upon the subject; looking also to the expressions of text-writers as evidencing the constant practice of the profession, your Lordships, in the course of the argument, came to the conclusion that it would be impossible now to open or disturb the rule as to the absolute necessity of having the word "dispone" in a conveyance of heritable property. I am, therefore, decidedly of opinion that the Appellants have failed in their contention that the deed of 1867 was a valid disposition of heritable property (3).

Then, my Lords, arises the second question, which has acquired a greater scope of argument at your Lordships' Bar, and on which some observations must be made. The deed of 1867 being invalid as a conveyance of heritable property, is it efficacious as a revocation of the prior deed of 1866? Upon this point a majority of the Judges of the Court of Session have held, that although inefficacious as a conveyance of heritable property, it has revoked the deed of 1866 and let in the title of the heir-at-law. Now I own that but for the respect which I entertain for the opinion of the majority of the Judges, I should have thought that this was a point admitting of very little question or argument. The deed of 1867 comprises and affects to dispose of both real and personal property—it contains no recitals, it affects simply to be a disposition of both kinds of property. Of course, if that disposition

(1) Sir *Richard Baggallay*.

(2) Lord *Cairns*.

(3) The deed of 1867 having been executed prior to the passing of the Scottish *Lands Title Consolidation Act* of 1868 (31 & 32 Vict. c. 101, s. 20), and Mrs. *Kirkpatrick* having died before that statute came into operation, it was held that the case must be governed entirely by the law and practice previously established; upon which the judgment of the House exclusively proceeds.

had been effectual, then, as a substituted disposition of the property in question, it would of necessity have been a revocation of the prior deed. Nay, more, my Lords, even if the disposition of the heritable property had not been effectual, still if there had been in the deed a separate and independent clause revoking the earlier deed of 1866, the question might have arisen and might have fallen to be decided whether by reason of the deed consisting of two separate parts, first a revocation, and then an attempted disposition, even though the attempted disposition should be invalid, still the revocation might be valid as removing out of the way the earlier deed.

Some of the learned Judges in the Court below appear to have satisfied themselves that although there was no actual clause of revocation in the deed of 1867, still there might be found in that deed provisions which would indicate an intention to revoke the earlier deed, separate from the intention to dispose of the property by the later deed. They point out that the deed commences by a statement that it is made "in order to regulate the management and distribution of the means and estate of Mrs. *Kirkpatrick*," and upon that it is said that you have there an intention to deal with the property as if there had been no prior disposition in the way, and you have also the property described as being the property of Mrs. *Kirkpatrick*, whereas under the deed of 1866 it had been made the subject of the trust dispositions contained in that deed, and could not literally be described as the property of Mrs. *Kirkpatrick*. My Lords, as to these observations I have to submit to your Lordships that the words "in order to regulate the management and distribution of the means and estate of Mrs. *Kirkpatrick*," are obviously part of one entire sentence, and are merely inserted for the purpose of introducing the disposition which immediately affects to follow, which disposition *ex concessis*, is entirely invalid and inoperative. As to the property being described as being the "means and estate of Mrs. *Kirkpatrick*," I apprehend that that is nothing more than a popular, and not by any means an unusual way for a lady to speak of property which has been originally hers, and not her husband's, even although that property may have been made the subject of a prior settlement.

But then the learned Judges refer to the clause of reservation

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at the end of the disposition attempted by this deed. That clause is in these terms:—

> Reserving always full power to me at any time of my life, and even on death bed, by myself alone to add to, alter, or revoke these presents either in whole or in part, and to sell, burden, or dispose of the whole subjects heritable and moveable hereby conveyed, or any part thereof, at pleasure.

It would appear to have been the opinion of the majority of the learned Judges in the Court below that the effect of that clause was, on the part of Mrs. *Kirkpatrick*, to resume into her power the whole dominion of the property, and to make her again absolute owner thereof. In opposition to that view I should adopt the view of Lord *Benholme* (1). It appears to me that the words which I have read go to create nothing more than a faculty or power engrafted on the disposition attempted to be made by this deed of 1867, and that that disposition failing, this faculty is inoperative. But I agree also with what Lord *Benholme* says, that even if it were an efficacious faculty, it is a faculty which never has been exercised; and therefore there is no one who can derive title under this power at present.

Now, my Lords, removing out of the way those particular expressions, the deed of 1867 remains in all respects simply and purely as an attempted disposition of the property heritable and personal. It may be efficacious as to personal property, and probably is so; but as to the heritable property the deed appears to me to be a deed which, if effectual and valid, would have disposed of that heritable property, and thereby would have revoked the deed of 1866; but not being efficacious or valid, it appears to me to be entirely inoperative as a revocation of the earlier deed.

Your Lordships have been referred to the authorities upon this subject, both to the very numerous cases which have been decided in *Scotland* and upon appeal in your Lordships' House, and to the authorities which are to be found among English decisions. It would, my Lords, be a useless task to go through those cases. A great number of them are cases where there was an express revocation, and in those cases the question arose very often whether even that express revocation, when coupled with an invalid and ineffectual substituted disposition, was to have effect given to it as a revocation of the earlier instru-

(1) 3rd Series, vol. ii. p. 594.

ment. Sometimes it was held that it would have that effect, and sometimes it was held, I think, that it would not; but that is a chapter of cases altogether irrelevant to the subject with which your Lordships have now to deal. It appears to me that no case has been produced, and that no case can be produced, where either in *Scotland* or in *England* a mere alternative inconsistent disposition, which is not valid or effectual in itself, has been held to revoke an earlier disposition of the same property.

My Lords, I therefore, upon this ground, think that the decision of the Court below ought to be reversed, and that the Defenders in the action in the Court of Session, the present Appellants, ought to be assoilzied from the conclusions of the summons.

LORD CHELMSFORD:—

My Lords, I agree with my noble and learned friend. The question may perhaps be regarded in the way in which it was presented by the learned counsel for the Appellants, namely, that where a subsequent deed, assuming the power exists to revoke or alter the former one, contains dispositions wholly different from the prior one without express words of revocation, as the two dispositions cannot stand together, the latter deed must prevail. This is on the ground, not of revocation, but of inconsistent provisions. Viewed in this light, the question appears to me to be very clear. The parties meant to vary and depart from the dispositions in the former deed by substituting other and different ones, but they failed to execute their intention in the only way in which it could be really and effectually done. Then the proposed substituted provisions never taking effect, nothing exists to interfere with the former deed.

Upon these short grounds I agree with my noble and learned friend that the interlocutors appealed from ought to be reversed.

LORD HATHERLEY:—

My Lords, as to the first point in this case, it appears to me that it is quite settled that the word "dispone" is absolutely necessary for the purpose of passing heritable property—and that it is a term of art which cannot be dispensed with. It is said that there has been no express decision to this effect; but

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there has frequently been a reference to the point as settled, both by text writers and by judicial authorities; and it has been far too long established as matter of style, on the part of conveyancers, to admit of being now departed from.

That being so, the heritable property must be taken as being wholly unaffected by the instrument of 1867, which was intended to revoke and to alter the disposition of 1866. The later instrument has failed as to this part; and then we find that it is established by the law of *Scotland* that a revocation in an instrument which is to be ascertained not by express words but solely by an inconsistent disposition being made of property which had been disposed of by a previous instrument in a different manner from that in which the second instrument purports to dispose of it, must be regarded as following entirely the course which that second disposition may prescribe. If that second disposition be inadequate for the purpose—if it fail, from whatever cause—whether, as in this case, from want of proper style, or whether it fail from the instrument not being properly attested, then the revocation must fail also. The Court feels itself in this position, according to the case cited by Mr. *Pearson* (1), that it can discover an intention to revoke only in the altered disposition which is attempted to be made by the second instrument; and if that disposition fails, then also the Court must fail to perceive an indication of an intention to revoke the first, the Court not being able to find that there is in truth any inconsistent disposition at all in consequence of that which was intended to be such having wholly failed to take effect.

The learned Judges have none of them disputed these propositions—in fact they all agree in the word "dispone" being a word necessary to pass heritable property, and they all agree, I think, in recognising the principle I have stated with regard to revocation, namely, that it can only be implied in an instrument making an inconsistent disposition which takes effect or which might take effect; and that it cannot be implied if the subsequent disposition fails to take effect (2). That, I think, was not disputed.

But the learned Judges said, We think we are not bound to

(1) *Onions* v. *Tyrer*, 1 P. Wms. 343; *Earl of Ilchester, Ex parte*, 7 Ves. 372.

(2) *Per* Lord *Braxfield*: The second settlement must be good in order to extinguish the first; *Dundas* v. *Dundas*, 1 Ross. 667.

say that the intention to revoke is only to be found in the fresh disposition which has been attempted to be made of the heritable property. We can find passages shewing an intention of revocation wholly independent of the disposition that is there attempted to be made of the heritable property, and quite apart from the difference between that disposition and the disposition contained in the preceding deed of 1866. The Lord Justice *Clerk* (1) says expressly, that passing that wholly by, and not looking at the disposition itself which is attempted to be made of the heritable property, he can still find within the four corners of this instrument of 1867 a clear intention of revocation. In that course he is followed by the Lord President (2), and by the majority of the learned Judges in the Court below. The view there taken was this:—The first deed having conveyed the property in such a manner that it displaced altogether Mrs. *Kirkpatrick's* possession, and vested that property in the spouses during their conjunct lives, making the survivor the fiar,—the second deed was executed with the following intent among other things. There was an intent to dispose of the heritable property in the way which the deed expressed, but which it failed to carry into effect for want of proper words, but there was also, say their Lordships, an intent to replace the wife in her original possession and control of the property as fiar, and to take a step further in that direction by giving her the absolute disposal of the property without any concurrence or control on the part of her husband.

I will refer to the words of the first portion of the deed in order to shew how those learned Judges read them:—

> I, Mrs. *Jane Kirkpatrick*, wife of *John Kirkpatrick*, Advocate, with the special advice and consent of the said *John Kirkpatrick*, and I the said *John Kirkpatrick*, for myself, my own right and interest, and we both with joint consent and assent in order to regulate the management and distribution of the means and estate of me, the said Mrs. *Jane Kirkpatrick*, after my death, do hereby give, grant, assign, convey, and make over all the heritable or moveable property presently belonging to me.

It is said that in these words there is a total passing by of the original deed of 1866, a representation of the property as being the absolute property of Mrs. *Kirkpatrick*, and an expression of inten-

(1) 3rd Series, vol. ii. p. 556. (2) 3rd Series, vol. ii. p. 584.

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tion that whatever is done afterwards in this deed is to be done for the purpose of regulating that property as her sole heritable property. Therefore, you can read, it is said, in that first opening of the deed an intention to treat Mrs. *Kirkpatrick* as absolute fiar, and to treat this property as her absolute property. It is said that that view is further confirmed when you come to the end of the deed by what you find in the proviso. Mrs. *Kirkpatrick* being spoken of all through the deed, as the person disposing of the property (though always expressing it to be with the consent of her husband), that view is confirmed by her, at the close of the deed, using this expression:

> Reserving always full power to me at any time of my life, and even on death-bed by myself alone, to add to, alter, or revoke, these presents, either in whole or in part, and to sell, burden, or dispose of the whole subjects heritable and moveable hereby conveyed, or any part thereof, at pleasure.

The Lord Justice Clerk and the Lord President hold that this was not intended to create a faculty, but that it was intended to follow out what they think they can trace in the initiation of the deed, namely an intention to replace this lady in her position of absolute fiar, and to give her authority to dispose of the property not by way of faculty, but as fiar, without the consent of her husband, and freeing her from all further necessity of concurrence on his part.

Now, that is a very ingenious construction; but I cannot think it tallies in any way whatever with the words and language of the instrument. In the beginning of the instrument, the husband is made to join, as, having regard to the former instrument it was necessary that he should join, in order to revoke that former instrument of 1866. He is made to concur in this deed "in order to regulate the management and distribution" of this lady's property. What does he do in order to do that? He disposes of the heritable property in a manner which, if it be regarded as a faculty, owing to the reason which has been pointed out, cannot have any effect whatsoever. Now, if what he was about to do was to confer upon Mrs. *Kirkpatrick* any special right in the property as distinguished from that interest which they had under the former deed, how does he purport to effect that? By making the grant in the words I have read. It seems to me to be no more than if it was expressed

thus; in consideration of this disposition being made, and effectively made, which I am about by this instrument to make (supposing he is about to make it), in consideration of the property being so disposed of, and going in this way, I permit my wife, subject to that disposition, to have the absolute control of the property. I permit her to be fiar, and hereafter to dispose of the property without my consent. Supposing that which the learned Judges have assumed to be the true interpretation of these words is their true interpretation (for a reason which I will give in a moment; I do not think it is the true interpretation), that this lady was to have an absolute control of the property without any further concurrence on the part of her husband, then I say that the whole of that arrangement depends on what was done, or supposed to have been done, by the husband in the former part of the deed, namely, the effective disposition he desires to see made of the property, although there is a power of revoking it committed to the wife.

Now if your Lordships look at the words themselves, I think you will see that they can hardly bear the construction put upon them by the learned Scotch Judges. They simply put into Mrs. *Kirkpatrick* again that absolute interest in the property which she had originally, and give her the power of disposing of it without her husband's consent as a portion of her original control over the property, and her interest in it, because what is done is this: the lady having made the conveyance, reserves to herself out of this conveyance which she had by this deed made, full power at any time of her life, and even on death-bed, by herself alone to add to, to alter, or revoke "these presents either in whole or in part, and to sell, burden, or dispose of the whole subjects heritable and moveable hereby conveyed, or any part thereof, at pleasure;" that is to say, she reserves to herself power to revoke all that she has thereby conveyed, and she reserves that power of revocation in order that she may burden or dispose of the whole subject. I think that is a much more natural way of reading the deed than that of the learned Judges in the Court of Session. It was the deed of both the husband and the wife disposing of the property, as they thought, in a given way, and having disposed of the property, as they thought, in a given way, they then gave to

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the wife, or she reserved to herself, the power of disposing of this property in future, which she had thereby conveyed, in any way that she might think fit, without her having to ask for any consent or concurrence on the part of her husband.

Therefore, my Lords, if it be a faculty, the faculty has not been exercised, and of course the original deed would stand; but even if you look to the intention, I still read the whole instrument as depending upon what the husband has done in regard to the heritable part of the property—as depending upon the disposition which has been made of the heritable property; and if that disposition fails, it comes round to that class of cases which is recognised by the whole Court, in which a changed disposition having been intended to take effect, but the changed disposition itself having failed to take effect, the intention to revoke is not any further to be presumed from it.

LORD SELBORNE:—

My Lords, on the first question the only point which has not been observed upon by my noble and learned friends is, that the deed of 1867, though not using the word "dispone" in the dispositive clause, does, in fact, use it by way of reference in some of the subsequent parts of the instrument. This may shew that the authors of the deed intended to dispone, and supposed themselves to have done so; but the technical rule of Scotch law appears to require that this word must occur in the operative portion of the instrument.

The heir-at-law is bound to make out with reasonable certainty a revocation of the prior deed independently of the disposition in the later, and this, I think, he wholly fails to do.

Reversal:—The Appellants to be assoilzied from the conclusions of the summons, with expenses before the Lord Ordinary and the Court of Session; and the cause remitted back to the Court below to do therein as shall be just and consistent with the judgment of the House.

Agents for the Appellants: *Loch & Maclaurin.*
Agents for the Respondents: *Martin & Leslie.*

THE LORD ADVOCATE . . . . . APPELLANT;

AND

CLYDE STEAM NAVIGATION COMPANY *et al.* . . . . . } RESPONDENTS.

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March 11.

17 & 18 *Vict. c.* 104—*Ship Measurement—Awning over Main Deck—Tonnage.*

Where over the main deck of a ship there was a covering or awning open at the sides, and unfit for the carriage of cargo, passengers, or crew, it was *held* by the House, affirming the decision appealed from, that tonnage was not chargeable in respect of such covering or awning as if it were a third deck :—

Per THE LORD CHANCELLOR :—I am of opinion that the ship in this case has not a third deck, available for cargo, or for the berthing or accommodation of passengers or crew.

Per LORD O'HAGAN :—The measurement of the ship's tonnage should be in accordance with her carrying capacity.

BY the *Merchant Shipping Act*, 1854 (1), it is enacted that if a vessel has a third deck, the tonnage between it and the tonnage deck shall be ascertained in the mode prescribed by the statute (4th and 5th sub-divisions of the 21st section).

The Lord Advocate, on behalf of the Board of Trade and the Commissioners of Customs, instituted the present suit in February, 1872, to have it declared that the tonnage of the Respondent's steamship the *Bear*, of *Glasgow*, was erroneously computed at an amount under the proper tonnage thereof as ascertained by the official surveyor.

The condescendence alleged that the vessel was a three-decked ship; the fact, however, being, that she had but two complete decks; and over the main deck, between the raised poop and the raised forecastle, a covering, or awning, termed an upper or third deck, not available for cargo or stores, nor fitted for the berthing or accommodation of passengers or crew, though useful in other respects.

The *Clyde Company* put in their defence, and the case came

(1) 17 & 18 Vict. c. 104.

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before Lord *Gifford* (Ordinary), who remitted the inquiry to Mr. *Mumford, Lloyd's* surveyor at *Glasgow*, to examine the state of the main deck of the *Bear*, and the erections, structures, and coverings thereon, so far as the same bore upon the question as to the measurement of the registered tonnage.

Mr. *Mumford* drew up an elaborate report. The following are extracts:

> The upper or third deck does enable the ship to carry cargo on most parts of the main deck with greater safety than if it was without the protection afforded by it. The upper deck, however, being separated in two places by gaps made quite across the vessel, and of the respective width of 13 ft. 6 in. and 8 ft. 6 in., is not practically a complete deck for all purposes of safety to ship and cargo; the hatches and doors referred to, not being efficiently secured, would admit of leakage in the wake of these openings.
>
> This deck being separated by openings completely across the vessel, and these openings being provided with planks and hatches unsuitable to any weather deck, which are not fastened down or rendered watertight, I do not consider it a continuous deck. The want of strength and efficiency of the gangway doors, and the position of the steerage side scuttles in the *Bear*, would therefore prevent her from being loaded down, as a three-decked ship, with well secured ports, may with safety be laden and sent to sea. If loaded regardless of these points the vessel would be unseaworthy.

The shipowners were desirous to have a proof; but this was opposed by the Lord Advocate—and the Lord Ordinary refused it, pronouncing his judgment on Mr. *Mumford's* report. His Lordship held, that "the space above the main deck intervening between the aft end of the forecastle and the front of the poop ought not to be measured or included as part of the register tonnage of the *Bear*."

The Lord Advocate reclaimed to the Second Division, who affirmed the Lord Ordinary's interlocutor (1).

In support of the appeal to the House of Lords, *The Attorney-General* (2), *The Lord Advocate* (3), *The Solicitor-General* (4), and Mr. *Beasley*, appeared.

Mr. *Southgate*, Q.C., and Mr. *E. Kay*, Q.C. were heard for the Respondents.

(1) 3rd Series, vol. xi. p. 440.
(2) Sir *Richard Baggallay*, Q.C.
(3) Mr. *Gordon*, Q.C.
(4) Sir *John Holker*, Q.C.

At the close of the argument the following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (1):—

My Lords, the ground upon which the rectification of the register is asked for, is that the *Bear* has a spar deck above the main deck, and that the space between the main deck and this spar deck ought to be measured, in accordance with the rules contained in the *Merchant Shipping Act* of 1854. The 5th sub-division of the 21st section of that Act provides that "if the ship has a third deck, commonly called a spar deck, the tonnage of the space between it and the tonnage deck shall be ascertained." Then follow certain rules for measurement. The question is, has the *Bear* a third deck, commonly called a spar deck? The condescendence of the Appellant affirms that she has.

No proof was allowed to the Respondents, although they desired to have a proof; but the case was by an interlocutor of the 18th of May, 1872, remitted to Mr. *Mumford, Lloyd's* surveyor at *Glasgow*, to examine the *Bear*, and

to report as to the state and position of the main deck, and of the erections, structures, and coverings thereon, as far as the same relate to the question as to the measurement for the registered tonnage.

Under this remit Mr. *Mumford* made his report, and the statements in that report, and the model referred to in it, are the only materials before your Lordships as regards the facts of the case. It appears from this report that

the deck in question being separated by openings completely across the vessel, and those openings being provided with planks and hatches unsuitable to any weather deck, which are not fastened down or rendered water-tight,

is not considered by Mr. *Mumford* to be a continuous deck. The report further states that

the doors are not fitted so as to be water-tight against any pressure, and the planks, top-sills of the doors, &c., covering the cuttings in the deck, are not made to fit so as to be efficacious in sheltering the cargo beneath them. A three-decked ship is usually loaded down, so that her main or middle deck amidships is at or below her waterline; the usual custom being that her submerged side amidships, measured from the top of the upper deck at the side to the waterline,

(1) Lord *Cairns*.

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should be three inches to every foot of her depth of hold. The want of strength and efficiency of the gangway doors, and the position of the steerage side-scuttles in the *Bear*, would therefore prevent her from being loaded down as a three-decked ship. If loaded regardless of these points the vessel would be unseaworthy.

I think it clear that the kind of upper or spar deck mentioned in the Act of Parliament is a continuous deck from stern to stern, fastened down and water-tight, sealing up the cylinder formed between the two decks, and making it a fit place for the stowage of cargo, like a hold.

In the case of the *Bear*, the upper deck plays rather the part of a covering platform for the main or tonnage deck. This covering is fixed for a certain distance. But in this covering there are two gaps made quite across the vessel, one before and one behind the funnel, and, as Mr. *Mumford* observes, the deck is not practically a complete deck for all purposes of safety to the ship and cargo. The *Bear* being a steamer used for coasting purposes, and chiefly for the conveyance of cattle, this which is called a deck is in reality a covering run along the ship, above and parallel to the main deck, for the purpose of affording shelter against weather, and at the same time affording a platform along which the crew can pass in navigating the ship. The cargo between this covering and the main deck is not cargo stowed and sealed up in a hold, but is deck cargo protected against the weather.

I am therefore of opinion that the *Bear* has not a third deck, commonly called a spar deck, within the meaning of sub-division 5 of sect. 21.

But it was contended that the register tonnage should be increased under sub-division 4 of the same section.

It appears to me that the condescendence and pleas in law are confined to the case advanced under the 5th sub-division of sect. 21, to which I have referred. But, even if this were not so, the argument under the 4th sub-division does not appear to me to be capable of being supported. The part of the deck underneath the moveable covering cannot in any sense be called a "permanent closed-in space on the upper deck, available for cargo." It is the whole of the deck underneath the covering, and there is no inclosure or separation of one part of the deck, cutting it off from the rest of the deck, nor is it a "space available for cargo," in the

sense in which cargo is used for the purpose of measurement. The cargo underneath the covering would be deck cargo merely. Neither is it "space available for the berthing or accommodation of passengers or crew;" nor is it suggested that it has ever been used for that purpose.

On the whole, I am of opinion that this appeal fails, and I submit to your Lordships that it ought to be dismissed with costs.

LORD HATHERLEY:—

My Lords, the onus of proof rests in a very peculiar manner in this case upon the Pursuer, because he seeks to alter a survey made by an official surveyor. Therefore to decide against the Respondents would be in effect, as it seems to me, not only to disregard Mr. *Mumford's* report, but to disregard the view of the surveyor who originally surveyed the ship, and who certainly did not then think of including these erections as coming within either the 4th or the 5th sub-sections of the 21st clause of the *Merchant Shipping Act.*

LORD O'HAGAN:—

My Lords, I am of the same opinion. I have not been at all affected by the considerations of public policy and the possible results of our decision, one way or the other, which have been pressed upon us, mainly by the Attorney-General. Such considerations may sometimes, but very rarely, be regarded as throwing light on the terms of a statute when obscure. But here we have nothing to do but to apply to the facts the plain words of the enactment, whatever may be the consequences either to the revenue or to the mercantile community.

The report of Mr. *Mumford* seems to me to conclude the case on both its branches. He is the sole witness;—an expert named by the Court, and appealed to for his judgment by both parties. The Crown officials cannot object to his competency and correctness, for they have insisted that by his evidence alone the matter should be determined; and, if it is to be relied on, the *Bear* is not a three-decked ship, according to the contention of the Appellant. In her original certificate of registry she was described as a two-decked ship, and rightly so described if Mr. *Mumford* is warranted

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in saying that her awning deck is not a continuous deck, is not that which is commonly called a spar deck, and, therefore, does not constitute a third deck within the meaning of the statute. He makes this still more clear when he states that the *Bear* cannot, without becoming unseaworthy, be loaded as a three-decked ship; and if she cannot, it would seem that the measurement of her tonnage should, in fairness as well as in accordance with the terms of the statute, be proportioned to her carrying capacity, and that she should be dealt with as a two-decked vessel.

I was struck by an observation of the Attorney-General, with reference to the danger of allowing shipowners to escape their proper liabilities by leaving portions of their vessels in an imperfect state, so as to keep them unreached by the exact description of the statute, and yet to make them available for profit on occasion. I am not prepared to say that such a danger may not arise, and that such an evasion ought not, if possible, to be prevented. But, in this case, I do not find any proof of a purpose of the kind. The Respondents deny it, and the sole witness, Mr. *Mumford*, does not allege it. Upon his testimony it seems impossible to hold that there is, in the place to which the question has reference, a space "permanently closed in" and suitable for the reception of "cargo or stores" or "the berthing or accommodation" of human beings. This is made clear by the report, which describes the place as in a condition wholly unfitting it for the reception of perishable goods or the safe and reasonably comfortable lodgment of passengers or sailors. By that report the Crown has elected to stand, excluding all access to other evidence and means of information; and, according to its findings, I think that the judgment of the Court of Session was perfectly correct, and ought to be affirmed.

Interlocutors affirmed, and appeal dismissed with costs.

Agent for the Appellant: *The Solicitor of Customs.*
Agents for the Respondents: *Grahames & Wardlaw.*

MR. SYMINGTON (THE HUSBAND) . . . . . APPELLANT;
MRS. SYMINGTON (THE WIFE) . . . . . RESPONDENT.

1875
March 18.

Judicial Separation for Husband's Adultery—Custody of the Children—No General Rule.

Per THE LORD CHANCELLOR (Lord *Cairns*):—The Act of Parliament (1) has given the Court the widest discretion to weigh the comparative advantages or disadvantages of giving the custody of all, or of any of the children, to the one parent, or to the other; and I am at a loss to conceive how any general rule can be laid down. It is the duty of the Court to consider all the circumstances of the particular case.

The Sons committed to the Father—The Daughters to the Mother.

Per THE LORD CHANCELLOR:—Grave as the offence in this case was, there appears to be no continuance of immorality. It is proved that the husband is affectionately attached to his children, and has always been so. He is engaged in a profitable business. I cannot perceive that an order which should take from him the custody of his sons would be conducive to their future welfare. It is a very different matter with regard to the daughters. Their mother, against whom nothing has been proved, is the natural person to have their custody.

Per LORD O'HAGAN:—The father did not lead an openly immoral life, but had the character of a religious and upright man. He had a genuine love for his children, and exhibited a watchful care of them; and there does not seem any reasonable ground for anticipating that the male children will be injured if their custody be with their father; especially as they are of sufficient age to be kept at school.

Per LORD SELBORNE:—Looking to the moral interest of these boys, I am not satisfied that it will be compromised by leaving them in the care of him who is their natural and legal guardian, and on whom their material interest must mainly depend.

THE marriage of the above parties took place in July 1860. At the husband's residence, near *Glasgow*, they lived together harmoniously and affectionately for ten years; and there are now five children, three sons and two daughters, of the marriage.

In October, 1870, the wife's health declining, her husband charged her with insobriety; and in January, 1871, he desired her to leave him. She complied, and took lodgings in *Glasgow*. The fact, however, turned out to be that the husband had by this time formed an improper connection with the family nurse, a girl

(1) 24 & 25 Vict. c. 86, s. 9.

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of sixteen, who was afterwards, for purposes of concealment, sent pregnant to *Ireland*, where she was delivered of a child, the result of the husband's adultery.

On the 31st of October, 1871, an agreement was entered into between the parties, and the wife returned to her husband's house in the beginning of 1872; but, soon finding her position unbearable, she again departed. On the 29th of October, 1872, she wrote to her husband, saying that "certain facts (1) had come to her knowledge which would prevent her returning to his house, and she was glad, therefore, that he proposed that they should live separate."

The subsequent negociations having failed, the wife, on the 3rd of April, 1873, commenced, in the Court of Session, the present suit against her husband for judicial separation, by reason of his adultery, praying also alimony, payable half-yearly.

The husband in his pleadings denied the adultery, but charged his wife "with being in the habit of indulging in narcotics and alcoholic liquors to excess."

Upon consideration of the evidence the Lord Ordinary (2) held that the alleged adultery was not proved; and he therefore sustained the husband's defence; but against this decision the wife appealed to the First Division, who recalled the Lord Ordinary's interlocutor, and found that the alleged adultery was proved; that the wife had full liberty to live separate from her husband, whom they ordered "to separate himself from her, *à mensâ et thoro*, in all time coming; finding him also liable to make payment to her of £100 for alimony yearly, at Whitsunday and Martinmas. The Court further found the wife entitled to the custody of the children during their respective pupillarities, requiring the husband to deliver them up to her forthwith, and to pay her £25 per annum for each of them (3).

Against this judgment the husband appealed to the House, having for his counsel

The Solicitor-General (4) and Dr. *Spinks*, Q.C., who contended

(1) Doubtless having reference to the nurse.

(2) Lord *Shand*.

(3) See Court of Session Cases, 4th Series, vol. i. p. 871.

(4) Sir *John Holker*, Q.C.

that the evidence of adultery by the husband was insufficient; that he had good grounds for his allegations against the wife; and that he ought not to be deprived of the custody of his children.

Mr. *Cotton*, Q.C., and Mr. *Thesiger*, Q.C., were heard for the Respondent.

The following opinions were delivered by the Law Peers:

THE LORD CHANCELLOR (1):—

My Lords, it is seldom that there comes before your Lordships for decision a case so intensely painful in all its details as the present—painful to read, and painful to speak of.

Having considered with great care the evidence as to adultery, I am bound to say that it leaves no doubt whatever upon my mind that the charge was established; and, indeed, your Lordships upon this point did not call upon the counsel for the Respondent to address you; the adultery taking the form of seduction in the conjugal mansion of a girl of the age of seventeen or eighteen, who was acting at the time as the nurse or caretaker of the children.

The question arose whether this adultery was proved merely by the evidence of the girl to whom I refer, or whether her evidence was corroborated by any further testimony. As regards the evidence of the girl, although the Lord Ordinary did not think it right to grant a decree for a divorce, he nevertheless stated, after having had the advantage of hearing and observing her demeanour, that she gave her evidence with modesty and propriety, and, as I infer from his words, in a manner which convinced him that she was not departing from truth; and further, with regard to her general character, we have had what may be termed, perhaps, undesigned testimony from another witness whose general intervention in the matter was such as to identify her to a great extent with the Appellant—I mean Miss *Walker*, who, writing to the grandmother on the occasion of the girl being sent to her, said this:

Your granddaughter *Lizzie*, who has lived with us for four years, and who during that time has conducted herself with rectitude and propriety, and

(1) Lord *Cairns*.

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awakened in all our hearts a tender and sincere interest in her happiness and welfare, has in some way unknown to herself fallen into the sad position of being about soon to become a mother.

We have, therefore, both from the Lord Ordinary, and from the main witness for the Appellant, the strongest testimony to the general good character of this girl.

But, my Lords, is it the case that there is any want of corroboration of the story which this girl has told clearly, distinctly, and consistently, so far as the story itself is concerned? I think there is the strongest corroboration, arising from the conduct of the Appellant himself. There is the improbability that any person but the Appellant could have been the father of the child of this girl. There was no male person but himself residing in the house where the husband and wife lived. The girl does not appear to have been in the habit of associating with any male acquaintance out of doors; and although there appears to have been the greatest anxiety to trace her in all her movements about the time that her pregnancy would have occurred, those who so traced her appear to have utterly failed to suggest any single person other than her master through association with whom the event of her pregnancy could have occurred. I will further remind your Lordships of the Appellant's conduct when the pregnancy of this girl was discovered. He became immediately most anxious to obtain a letter from her which upon the face of it should declare that no person at *Nyeholm* (1) was the father of the child. The girl appears in the first instance to have demurred to making a statement of the kind, but she was urged to do so both by the Appellant and also by Miss *Walker* acting on his behalf; and finally, after she had passed from *Scotland* into *Ireland*, and was on the point of being placed with her grandmother, she wrote a letter, under the eye and at the instance of Miss *Walker*, in a form, and gave it to Miss *Walker* in a way, which would lead any person observing it to imagine that it had been written voluntarily by her when she was at a distance from Miss *Walker*, and sent by her from *Ireland*. Then we have that most remarkable statement in the evidence of Miss *Walker*, that the moment she received this letter she handed it to the Appellant, for the purpose of the Appellant handing it to

(1) The residence of the parties.

his professional agent, before a word of accusation had been said against the Appellant, in order that he might be armed with this letter to answer the accusation which he clearly anticipated would be advanced against him.

Miss *Walker* urged from time to time that the grandmother and the relatives of the girl should extract from her a statement as to who was the father of the child—a matter which ought to have been of complete indifference to Miss *Walker*, and also to the Appellant if he was innocent.

Mrs. *Symington* having left her husband's house to reside with her brother, she some months afterwards, on the 31st of October, 1872, met her husband for the purpose of arranging terms by which she might resume her residence with him. At the time she had left the house there had been no suspicion of any pregnancy of this girl, or indeed of anything actually wrong having occurred between the girl and the Appellant. About a week before this 31st of October a medical man, after an examination of the girl, had reported her to be pregnant, and thereupon steps were taken for passing her over to her own relatives, who lived in the north of *Ireland*. At the meeting, the husband concealed from the wife that the children had lost the person under whose care they had been, and that she had left the house. Is there any theory on which this reticence on the part of the husband can be accounted for, except the theory of conscious guilt? And yet the pleading of the husband represented her as satisfied that the imputations against him were groundless, when the occurrence which of all others would have shewn those imputations to be well founded had been absolutely concealed by him.

When, subsequently, Mrs. *Symington* appears to have come into contact with Miss *Walker*, and to have inquired, or to have been informed, about this girl, she was then told that she had left, not in consequence of her being in the condition to which I have referred, but for some trivial fault, or for some want of efficiency as a servant.

My Lords, I have referred in general terms to these various circumstances which appear to me to amount to the strongest corroboration of the charge against the husband; and I am unable to understand how any other conclusion upon these facts could

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be arrived at than that the charge of adultery had been established.

But now, my Lords, I turn to a very difficult and hardly less painful part of the case—with regard to the custody of the children, five in number. By the 9th section of the *Conjugal Rights (Scotland) Act* (1) there is a provision very analogous to the provision in the English Act (2) upon the same subject, viz.:—

> In any action for separation *à mensâ et thoro*, or for divorce, the Court may from time to time make such interim orders and may in the final decree, make such provision, as to it shall seem just and proper with respect to the custody, maintenance, and education of any pupil children of the marriage to which such action relates.

Reference in course of the argument was made to authorities both in *England* and *Scotland;* and it was suggested that, certainly in *England*, the analogous provision to that which I have read had been acted upon in this way,—that where a wife established her title either to a divorce or to a judicial separation, it was either matter of course, or almost matter of course, that the decree should carry with it for her the custody of the children; and that having shewn good cause for severing the conjugal tie, she, not being in fault herself, should not be amerced or punished by being deprived of the custody of her children. My Lords, I should greatly regret that any general rule, so sweeping, and, as it appears to me, so inconvenient in its working, should be laid down on a subject of this description. It appears to me that the Act of Parliament has given the Court the widest and the most general discretion, and has purposely done so; and I think it must be the duty of the Court to consider all the circumstances of the particular case before it—the circumstances of the misconduct which leads to a separation no doubt—the circumstances of the general character of the father—the circumstances of the general character of the mother—and, above all, it should be the duty of the Court to look to the interest of the children, and carefully to weigh the comparative advantages or disadvantages of giving the custody of all or of any of them to the one parent or to the other. I am at a loss to conceive how any general rule upon such a subject can be laid down. Certainly I should prefer to ask your

(1) 24 & 25 Vict. c. 86, s. 9. (2) 20 & 21 Vict. c. 85, s. 35.

Lordships to act, not upon any general rule, but upon the circumstances of the case now before us.

The husband and wife appear to have lived, so far as the outside world could observe, in great happiness from the time of their marriage, during ten years, from 1860 to 1870; and during those ten years the five children whom I have spoken of, and another child, who is dead, were born. In 1870 it appears clear that the health of Mrs. *Symington* was considerably impaired; and there arose in the mind of her husband, as between him and his wife, some want of that complete harmony which had previously prevailed. He suggested, indeed broadly stated, to the family of his wife that she had been in the habit of indulging to excess in narcotics and in the use of stimulants. I pass over a lengthened correspondence which arose upon that subject, in which the family of the wife appear to have commented mainly upon the statements made by the husband, and to have had no other knowledge upon the subject.

As time went on, these charges were made to the wife herself, and persevered in by the husband with an obstinacy, and I must say a harshness, and perhaps coarseness, which cannot but strike the mind with feelings of the gravest reprehension. The wife, in the first place, denied the charges, but it appears that in the early part of the year 1871, at the house of Mr. *Leckie*, she made a very vague and brief verbal statement, which was said to be, and was from that time forward called by her husband, a confession of the charges which he had made. She stated afterwards that what she had said was under the pressure of constraint, and in the hope that it might satisfy her husband, and that he might not persist in an arrangement which he had been proposing, that she should live for some time with her friends. However, the statements she made had not that effect, and she went for some months to reside with her friends. At the end of that residence came the agreement of the 31st October, 1871. It is an agreement in writing, and it was signed at the house of Mr. *Leckie*, after considerable discussion and remonstrance on both sides, which had lasted for several hours. I do not stop to read it over, but your Lordships will remember that it carries upon the face of it expressions which certainly are not a repudiation, but are in a qualified way

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open to the construction of entertaining and reasoning upon the charges made by the husband against the wife in this respect. That agreement again the wife asserts, so far as it has the bearing which I have mentioned, was obtained from her under pressure, and when she had no assistance which would have enabled her to resist it (1).

I find no evidence whatever which would justify any charge of habits such as are alleged against the wife. And your Lordships have to consider this, that there has been given to the husband in this case the fullest and the most ample opportunity of adducing any evidence which he was able to adduce upon this subject. He appears to have spared no pains for that purpose. The wife was scrupulously and jealously watched in her own house by eyes which certainly were not friendly to her. If these habits were habits to which she was addicted, the means of supplying the indulgence of them could not have been possessed by her without traces being left, which traces could easily have been exhibited in evidence.

It appears to me that the conduct of the husband in making these charges was that of an obstinate, overbearing, tyrannical man, drawing conclusions from insufficient premises, and blindly refusing to be undeceived in ideas which he had once entertained.

My Lords, the result of the view which I take of the case is this—that there is nothing established against the wife which can disentitle her to be considered a person who ought to have the custody of the children if, on other considerations, it is proper to assign that custody to her. The children are five in number, and the three elder are boys. The boys were born in the years 1863, 1864, and 1866, and they are now, as we understand, boarders at school. The two younger children are girls. They were born in the years 1868 and 1870. The husband is engaged in business, which appears to be not otherwise than profitable. He is in middle life, and it is proved that he is affectionately attached to his children, and has always been so. I must say also that, although deploring, and severely reprehending the conduct established, and the sin proved against him, it is also to be borne in

(1) The agreement is set out in the Respondent's Case, p. 172.

mind that until the commission of that offence he bore, and apparently justly bore, a high character for uprightness and morality in the world; and it is some consolation to observe that grave as the offence proved in this case was, there appears to have been no continuance of immorality, and I trust that I am not saying too much when I say that there is reason to hope for a return on the part of the husband to the paths of morality and propriety of life.

The Court of Session have removed the custody of the whole of the children from the husband and given it to the wife. With regard to the boys, I cannot, for my own part, perceive that an order which should take their custody from their father and hand it over to their mother, would be conducive to the future welfare of the children. It is a very different matter with regard to the girls. I think their mother, not being proved to be in any way disqualified from having the custody and care of the girls, is the natural person to have that custody and care. On both sides there ought to be a careful opportunity of access, so that none of the children may grow up without as full knowledge and as full intercourse as the case will admit of with both parents, in the hope that a curtain of oblivion will be drawn over all that has occurred.

The order which I should suggest to your Lordships to make in this case would not interfere with the interlocutor of the 20th of March, 1874, so far as it finds adultery proved and decrees separation, ordering also the payment of aliment, but varying the interlocutor as to the custody of the sons. (1)

If your Lordships should concur in the variation of the interlocutor which I now propose, I think, having regard to the fact that upon the main question in the suit your Lordships agree with the Court below, and also having regard to the fact that the Respondent could not be made to bear costs as against her husband, the costs of this appeal should be awarded to the Respondent.

LORD O'HAGAN:—

My Lords, in this lamentable case we are required to determine

(1) The final judgment of the House, as proposed by the Lord Chancellor, is set out at the close of the report.

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whether the adultery of the Appellant has been sufficiently established; and, if it has, to what custody shall his children be committed?

On the first question we have been fairly pressed by the argument that the Lord Ordinary, who had the advantage of seeing the witnesses and judging of their veracity from their demeanour before himself, should not have his decision lightly set aside. And, undoubtedly, the value of *vivâ voce* testimony can be much better ascertained by those who hear it than by those who know it only from report. But there is this peculiarity in the present case, that the Lord Ordinary has put us somewhat in his own position, and enabled us, so to speak, to see with his own eyes, when he states the impression produced on him by the principal witness, and describes her as "a girl of modest appearance, who gave her testimony, generally, with an air of truthfulness." And he speaks favourably of her aunt, another witness, whose part in the transactions is of great importance. Besides, we are concerned, directly, not with the judgment of the Lord Ordinary, but with that which overruled it; and the latter we ought to affirm, unless we are satisfied of its error.

Direct corroboration by eye-witnesses of the guilt of the Appellant there is not, and in cases of this kind it can rarely exist; but the corroboration supplied by his own subsequent conduct seems strong and persuasive. Such corroboration may be of the most satisfactory character, and is every day accepted as conclusive in the most serious cases. It is very difficult, indeed, to reconcile with a presumption of conscious innocence the sending of the girl to *Ireland* in the companionship of Miss *Walker;* the repeated attempts to obtain from her a declaration exonerating from the blame of her seduction the inmates of *Nyeholm,* in which the Appellant was the only male resident; the falsehoods patent on the face of that letter, which were not, certainly, the emanations of her own mind; the unworthy trick of posting it in *Ireland,* addressed to Miss *Walker,* at *Glasgow,* with the purpose of establishing another falsehood, that it was not written in Miss *Walker's* presence, or under her influence; and the further falsehood, that it was not shewn by Miss *Walker* to any one, although she had, on her arrival in *Scotland,* given it to the Appellant, who handed it to his lawyer to be used, manifestly, if the precise charge we are investi-

gating should be made against him. In some of these transactions Miss *Walker* acted whilst the Appellant was absent, but it is clear that they were begun with his full knowledge and assent, that they were carried through by his agent, and that he took advantage of their result; and therefore he can scarcely complain if he be held responsible for the consequences.

We have been much and properly pressed by the very strong evidence as to character given by gentlemen of position and high intelligence; and we have been asked to remember the maxim which experience sustains, "*Nemo repente fuit turpissimus.*" An accused man should have the benefit of the presumption of integrity which arises from the virtue of a lifetime. But it is open to the observation, that, in cases of this peculiar kind, general good character is of less value than in others. It must often be accepted as a doubtful answer to such charges of moral aberration as affect the Appellant, when positive proof encounters the presumption.

On the question of fact, I feel obliged to concur with my noble and learned friend, and on the question of discretion, I, also, concur with him.

The jurisdiction as to the custody and education of children committed to the English and Scotch Courts by the *Conjugal Rights Act* and the *Divorce Act* is identical and very extensive, and involves great responsibility for its judicious exercise. We are bound to have regard, not to any mere technicalities, or hard and fast rules of practice, but to the real interests of all the parties whom our decision may affect, and to do, for all, what may seem most judicious. The father's right to the guardianship of his child is high and sacred. Our law holds it in much reverence; and it should not be taken from him without gross misconduct on his own part and danger of injury to the health or morals of the children. His proved adultery must, under certain circumstances, make the withdrawal of it inevitable; but bad as the offence may be, there may be considerations of convenience and advantage to the children which, if injury to them be not likely to arise, should forbid their withdrawal from the father's care.

We are reasonably required to consider that the father in this case did not lead an openly immoral life, or do any acts which,

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coram populo, could deprive him of the character he had acquired as a religious and upright man; and that, in his general dealings with his household, he acted with strict propriety. Upon the evidence, he is entitled to say that neither before nor after the one seduction has anything of immorality been proved against him. It is not likely that the bitter experience he has had of the consequences of a departure from the line of duty will induce him to a change of conduct calculated to justify the accusations he has so strenuously denied, and there is, therefore, apparently reason for expecting more careful avoidance, at least of any open misconduct or ill example, in the future than in the past. Then, he seems to have had a genuine love for his children, and to have exhibited a watchful care of them.

Considering these things, there does not seem any sufficient ground for anticipating that the male children will be injured, morally or otherwise, if their custody be continued with their father, especially as they are of sufficient age to be sent to school. He will be subject, at all times, to the vigilant observation of their mother, who will have full access to them, and the continual supervision, and, if it should be necessary, the prompt intervention, of the Court for their protection from any evil. And, if this be so, there are, on the other hand, patent considerations affecting the interests of the children and their prospects in the world, which make it undesirable that the connection with their father should be broken off, leaving him in lifelong isolation, and depriving them of the material benefits which they may anticipate at his hands. The words of Lord *Neaves*, in *Lang* v. *Lang* (1), to which we have been referred, are sensible and just:—"If we take a man's children from him we leave him a solitary being, and deprive him of the most powerful inducement to amendment of life. It is not that he has committed faults, but that he teaches, or is likely to teach, evil to them, and to corrupt their morals, that can alone entitle us to interfere." And, in addition, I am affected by the consideration that an absolute separation of the Appellant from all his children might not only deprive them of important advantages to be derived from him hereafter, but would, also, destroy the

(1) 7 Macp. p. 447.

possibility of that reunion of the husband and wife which, notwithstanding all that has occurred, may yet, I trust, and perhaps through their intercourse with the children, to whom they are bound by a common affection, be happily accomplished.

I am bound to say, that I fully concur with the Lord Chancellor as to the failure of proof of the charges against Mrs. *Symington;* and I concur with him further in his condemnation of the excessive harshness and severity with which she was treated, and which, in my opinion, would have had no adequate justification even if every one of those charges had been clearly established.

Agreeing on both the questions in the case with my noble and learned friend, I fully approve the advice he has given your Lordships.

LORD SELBORNE :—

My Lords, entirely agreeing, as I do, with the explanation which my noble and learned friend on the woolsack has given of his grounds for adhering to the decision of the Court of Session, so far as relates to the painful subject of adultery, I do not propose to say one word more on that part of the case.

With respect to the more difficult and not less anxious portion of the case, as to the custody of the children, I will take the liberty of making a few, and only a few, observations. I do not think it necessary to add anything to the reasons stated for leaving the girls under the mother's charge. The difficulty, in my mind, has had relation to the boys alone, as to whom I do not think that the right of the father or the right of the mother stands in a position which can make it otherwise than proper for your Lordships to turn the balance by having regard to the interest of the children. The interest of those children, of course, is to be regarded from two points of view. Their material interest obviously is not in the direction of complete separation from their father, from whom apparently their means of support in life are entirely derived. No doubt the moral interest is, in cases of this kind, of even greater importance than the material; but, looking to the moral interest of these boys, I am not satisfied that it will be compromised by leaving them in the care of him who is *primâ facie* their natural

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and legal guardian, and on whom their material interest must mainly depend. The offence of the father was neither preceded nor followed by any generally vicious course of life. There is in many, if not in all men a constant inward struggle between the principles of good and evil; and because a man has grossly fallen, and, at the time of his fall added the guilt of hypocrisy to another sort of immorality, it is not necessary, therefore, to believe that his whole life has been false, or that all the good which he ever professed was insincere or unreal. I will hope better things of this gentleman; and I am willing to believe that before these unhappy events he was a man sincere in his profession of right principles, and desiring to do what was right, and that it is not beyond hope that he may hereafter live in accordance with that profession.

Entirely concurring in what has been said as to the absence of any evidence to justify the imputations upon the wife, also entirely concurring in what has been said as to the absence of any justification of the husband's conduct towards her, even upon the hypothesis that he fully believed those imputations to be true, still I am bound to say that I cannot agree with the Court below in holding that those imputations originated in a deliberate purpose of injustice to the wife, much less in any purpose to cover, by means of that injustice, the further wrong committed. Dr. *Stark*, a witness not impeached, proves that four years or more before these unhappy events, and when the husband and wife were living on terms of apparently uninterrupted affection, the husband consulted him, being even then under the impression that the wife was injuring her health by the use of stimulants. Dr. *Stark* himself drew a similar conclusion. I cannot but believe Dr. *Stark*, who, if he is to be credited, distinctly proves that these ideas in the husband's mind originated at a time and under circumstances which are absolutely inconsistent with that hypothesis of his motives which the Court of Session thought it right to adopt.

In that state of things I do not think that the conduct of this gentleman has been such as to give your Lordships sufficient reasons for apprehending that the moral, any more than the material, interest of the boys will suffer if they are, upon the

terms and under the safeguards which have been recommended, left under their father's care.

The final judgment of the House was as follows:—

Ordered and Adjudged, That the interlocutor or judgment of the Lords of Session in *Scotland*, of the First Division, of the 20th of March, 1874, complained of in the said appeal, be, and the same is hereby affirmed, except in so far as the said Lords "find the Pursuer entitled to the custody of the children of the marriage during their respective pupillarities, so long as no other or different order may be made by the Court with regard to them or any of them, and decern and ordain the Defender forthwith to deliver over the said children to the custody of the Pursuer accordingly: Find the Defender liable to the Pursuer in aliment, at the rate of £25 per annum for each of the said children, so long as they shall respectively remain in her custody in terms hereof, subject to the burden on her part of providing for the clothing and education of the said children respectively, beginning the first payment of the said aliment on the 1st day of April next, for the period between that date and the term of Whitsunday next, and the second payment at the said term of Whitsunday next for the year immediately following, and so on half-yearly thereafter, at the two terms of Martinmas and Whitsunday, so long as such aliment shall be payable as aforesaid, with the lawful interest on each termly payment, from the date when the same falls due till paid, and decern for the foresaid respective sums of aliment accordingly, and allow the foresaid judgment and decrees to go out and be extracted *ad interim*, reserving to both parties respectively, in the event of any material change of circumstance, or of any dispute arising as to the education of the said children, or any of them, or of any different or further regulations becoming necessary, to apply to the Court for such variation on the foresaid sums of aliment, or any of them, or upon the foresaid directions as to the custody or education of the said children respectively, or for such regulations as to access to the said children, or otherwise, as the Court may consider reasonable:" which findings and decernitures are hereby recalled: and in place thereof, It is Ordered and Adjudged, that the Pursuer (Respondent) is entitled to the custody of the two youngest children (*Agnes* and *Margaret*) of the marriage during their respective pupillarities, so long as no other or different order may be made by the Court of Session with regard to them, or either of them, but with such direction for access of the Defender (Appellant) as the said Court shall think reasonable, and subject to the obligation of not removing them, or either of them, from out of the jurisdiction of the said Court: and it is hereby Ordered, That the Defender (Appellant) do forthwith deliver over the said two children to the custody of the Pursuer (Respondent) accordingly: and it is further Ordered, That the Defender (Appellant) is liable to the Pursuer (Respondent) in aliment at the rate of £25 per annum for each of the said children, so long as they shall respectively remain in her custody in terms hereof, subject to the burden, on her part, of providing for the clothing and education of the said children respectively, beginning the first payment of the said aliment on the days already fixed by the said interlocutor, namely, on the 1st day of April next, for the period

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between that date and the term of Whitsunday next, and the second payment at the said term of Whitsunday next for the half-year immediately following, and so on half-yearly thereafter, at the two terms of Martinmas and Whitsunday, so long as such aliment shall be payable as aforesaid, with the lawful interest on each termly payment from the date when the same falls due till paid: and it is further Ordered, That the Defender (Appellant) is entitled to the custody of the other children of the marriage during their respective pupillarities, so long as no other or different order may be made by the said Court with regard to them, or any of them, subject to the obligation of not removing the said children, or any of them, from out of the jurisdiction of the said Court, and also to the burden of providing for the maintenance and education of the said children according to such directions as shall from time to time be given by the said Court for that purpose, and also subject to such regulations for securing the access of the Pursuer (Respondent) to the said children, or the occasional residence of the said children with the Pursuer (Respondent), as the said Court may consider reasonable; reserving to both parties respectively liberty, in the event of any difficulty, dispute, or change of circumstances, to apply to the said Court for such variation on the foresaid terms of aliment, or the foresaid directions as to custody, education, and access, as the said Court may consider reasonable: and it is further Ordered, That the Defender (Appellant) shall not be entitled to repayment from the Pursuer (Respondent) of the sums paid by the Defender (Appellant) to the Pursuer (Respondent) for the aliment of the said children during the period they were in her custody in virtue of the said interlocutor: and it is further Ordered, That the Appellant do pay, or cause to be paid, to the said Respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk of the Parliaments: and it is further Ordered, That the cause be, and the same is hereby remitted back to the Court of Session in *Scotland* to do therein as shall be just and consistent with this judgment; and it is also further Ordered, That unless the costs certified as aforesaid shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the Court of Session in *Scotland*, or the Lord Ordinary officiating on the bills during the vacation, shall issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

Agent for the Appellant: *William Robertson.*
Agents for the Respondent: *Grahames & Wardlaw.*

McDOUALL . . . . . APPELLANT; 1875
THE LORD ADVOCATE . . . . . RESPONDENT. *April* 16.

Salmon Fishing.

Per THE LORD CHANCELLOR (1):—The title, being baronial, will be a *habile* foundation for a claim to salmon fishing if the requisite enjoyment and user be established. A title by grant *cum piscationibus* will suffice if supported by the requisite enjoyment and user.

Prescriptive Enjoyment—Net and Coble—Stake-net.

The prescriptive forty years' enjoyment may be by net and coble, as well as by stake-net.

Per THE LORD CHANCELLOR:—I cannot recognise the principle that stake-net fishing is the ordinary and well-understood mode of salmon fishing in the sea.

Per LORD HATHERLEY:—The mode must vary from time to time as improvements are suggested.

MR. McDOUALL, of *Logan*, in *Wigtonshire*, holds the bulk of his estate under a baronial title, and the residue under a grant from the Crown *cum piscationibus*, without mention of salmon. The object of the Lord Advocate's suit was to obtain a declaration that the salmon fishings in the sea, *ex adverso* of the *Logan* estate, belonged to the Crown, and that Mr. *McDouall* had no right to them. The Lord Ordinary (Lord *Ormidale*) decided against the Crown, on the ground of Mr. *McDouall's* legal right and prescriptive possession; but the First Division of the Court of Session recalled the Lord Ordinary's interlocutor, and decided that the forty years' prescription could not have adequately accrued, seeing that the appropriate mode of fishing, by stake-net, for salmon was not introduced at *Logan* till 1856; the previous methods by net and coble having been used for white fishing and not for salmon, although salmon were occasionally taken (2).

Mr. *McDouall* appealed to the House, having for his counsel Mr. *Cotton*, Q.C., and Mr. *Alexander Blair*, of the Scotch Bar.

The *Lord Advocate* (Mr. *Gordon*, Q.C.), Mr. *Manisty*, Q.C., and Mr. *Nicholson*, of the Scotch Bar, appeared for the Crown.

(1) Lord *Cairns*. (2) See 3rd Series, vol. ii. p. 688.

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At the close of the argument, the following opinions were delivered by the Law Peers:—

The Lord Chancellor (1):—

My Lords, in this appeal there is not, as far as I can understand it, any question of law involved, nor is there, indeed, any controversy of any moment as to the statements of fact. The controversy between the parties is as to the right to the salmon fishing in the sea on certain parts of the east and west sides of the *Wigton* peninsula, terminating in the *Mull of Galloway*. It is now clearly established by the decision in the *Gammel's Case* (2) that the right of salmon fishing in the sea round the coast of *Scotland* belongs to the Crown, and is *inter regalia*, except so far as it has been parted with by grant. Nor is there any doubt of this further proposition, that the onus lies upon those who maintain the right as against the Crown of shewing that they derive that right either by express grant, or by a grant sufficiently large to carry salmon fishing, if connected with user and enjoyment for the requisite period. The right of the Appellant, as regards by far the greater portion of the case, consists of his title to a barony, in which there are no express words as to fishing, but as to which it is undoubtedly clear upon all the authorities, that the title, being baronial, will be sufficient to be a *habile* foundation for a claim to salmon fishing, if the requisite enjoyment and user be established. As regards one other part of the case, a much smaller and more insignificant part, called the five merk land of *Cricheu*, the title is not a baronial one, but a title by grant *cum piscationibus*, which upon all the authorities will be a *habile* title for the foundation of a claim to salmon fishing if supported by the requisite enjoyment and user.

The law, therefore, upon this point being entirely clear, it now becomes a question of fact, has the Appellant in the present case, having a *habile* title upon which to found his claim, shewn a user and enjoyment sufficient to perfect that claim for a period of forty years and upwards?

The conclusions which I draw from the evidence are, that there is on the one hand proof of the exercise of the right personally by

(1) Lord *Cairns*. (2) 3 Macq. 419.

the Lairds of *Logan* themselves for the requisite period of time, and proof on the other hand of no adverse exercise of the right, but, on the contrary, of a further enjoyment of the right by them through others to whom they gave permission, and from whom they received their return; so that enjoyment under a *habile* title, which the law requires, is clearly established. I do not find that the Court of Session arrived at any conclusion different from that which I have arrived at upon the question of fact. I do not understand that they viewed the evidence differently from the way in which I view it; and, so far, I think, the Inner House were at one with the Lord Ordinary. But I understand the ground upon which the Inner House felt constrained to reverse the interlocutor of the Lord Ordinary was, that there was not here a proof of the exercise of that mechanical kind of fishing which would instruct a right of salmon fishing in the sea. I will read to your Lordships the observations of Lord *Ardmillan;* but I understand them to amount to this, now that it is decided that the Crown has the right to salmon fishing in the sea round the coast of *Scotland,* it will not be sufficient to instruct a right of salmon fishing as against the Crown to shew that you have practised the salmon fishing by net and coble merely—there must be something more—there must be the fixed stake-net fishing to attain this end.

Now, my Lords, this becomes an extremely important point, not merely in the present case, but in other cases which may arise. Lord *Ardmillan* says:

> The proof of possession in the present case is, in my opinion, altogether inadequate to support the claim of Mr. *M'Douall* to a right of salmon fishing. The ordinary and well-understood mode of fishing salmon in the sea *ex adverso* of the *Logan* estate, was certainly introduced for the first time in 1856, but not so long ago as to amount to prescriptive possession.

So that the Lord Ordinary's judgment, if I understand it rightly, would go to this, that there cannot be prescriptive possession against the Crown, because this, which the learned Judge calls "the well-understood mode of salmon fishing in the sea," was not introduced at the time when the prescriptive possession must be shewn to have commenced.

My Lords, this appears to me to raise a question of very great importance. We all know that until the decision of this House in

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the year 1828 (1), it was not understood in *Scotland* that stake-net fishing in the sea was lawful. This House decided that it was lawful; but we know, as matter of history, that a very considerable interval after that decision elapsed before stake-net fishing became at all general in the Scottish sea, and for this obvious reason, that at the time when there was little or no consumption of salmon, except such as was local, a sufficiency of salmon could be procured to answer requirements by the ordinary old and much more inexpensive mode of fishing by net and coble. When salmon became a more valuable commodity, persons were found who were willing to go to a greater expense in establishing fixed engines and fixed nets in the sea for the purpose of taking salmon. Then, as we have had occasion to see, stake-nets were resorted to; but that did not occur in the present case until the year 1856. Now, as I understand the reasoning of Lord *Ardmillan*, it is this, that it having been held in many cases that the proper mode for a river of practising salmon fishing under a title being by net and coble, any fishing by rod goes for nothing. It is not the appropriate mode by which to gain a prescriptive title. Then, says Lord *Ardmillan*, stake-net fishing in the sea having now become the great and only wholesale way of catching salmon, stake-net fishing in the sea stands towards fishing by net and coble in the same relation that net and coble fishing in a river stands to rod fishing. Rod fishing in a river will not give you a prescriptive title where you have not net and coble fishing. So, in the sea, net and coble fishing will not give you a title where you should have the greater and larger mode of fishing by stake-net.

My Lords, I must say this is a principle which is, to my mind, altogether novel. I do not know any authority for it. I cannot recognise this principle which I find here laid down that stake-net fishing is "the ordinary and well-understood mode of salmon fishing in the sea," and the mode by which a prescriptive title is to be obtained. It is perfectly true to say that you have this incident with regard to net and coble fishing in the sea that you have not in a river. Net and coble fishing in a river can be only for the purpose of catching salmon; but net and coble fishing in the sea

(1) In the *Kintore Case*, 3 Wilson & Shaw, p. 261.

may be, and very often is, for the purpose of catching both salmon and white fish. And it may be a very proper inquiry to make in every case, was the net and coble fishing in the sea upon which you rely intended and used for the purpose of taking salmon, or was it merely used in pursuit of white fish; and was the taking of salmon merely an incident and not part of the object or aim of the fishing? That may be a very proper inquiry; but the same observation may be made with regard to stake-net fishing, because stake-net fishing, as shewn in the present case, results in the capture not only of salmon but also of white fish; and although the probability is that so expensive a mode of fishing would not be used for white fishing, still there is nothing to prevent its being so used. Therefore, my Lords, I am bound to express my dissent from the first ground of Lord *Ardmillan's* opinion, though it is agreed to by the other Judges.

The second ground, as I understand it, is, that with regard to the ownership claimed to be exercised by the Lairds of *Logan* in connection with permissions to some people and prohibitions to others, what was done was not done with reference to the salmon fishing, but with reference to all fishing of every kind. This appears to me to be neither a necessary nor a fair inference from the evidence, and to be one which ought not to be drawn.

The third ground of Lord *Ardmillan's* opinion is, that in the year 1856, after the stake-net fishing was introduced, persons were allowed to go on fishing with draught nets (the net and coble) as they had done before; at all events, to some extent as they had done before. My Lords, it appears to me to be impossible to say that that can alter in any way the rights, whatever they were, of the Laird of *Logan*.

My Lords, those are the grounds which I find in the judgment of the Inner Division. They do not take a different view of the facts from the view which I take, and which is taken by the Lord Ordinary. They take a different view as to the conclusions and inferences to be drawn from those facts. My Lords, I arrive in the result at the conclusion that the interlocutor of the Lord Ordinary was correct, and upon the whole case I submit to your Lordships that the interlocutor appealed from must be reversed, and the interlocutor of the Lord Ordinary restored.

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Lord Hatherley:—

My Lords, I fully concur in the view which has been expressed by my noble and learned friend the Lord Chancellor.

It appears to me, after again perusing the evidence, which we have had very carefully, and I may say excellently and ably sifted by the learned counsel on both sides, that there is not the slightest conflict of evidence of any substantial character in this case. The difference between the Lord Ordinary and the Inner House seems to be mainly reduced to that point which was indicated by Lord *Ardmillan* in his decision, namely, whether or not the evidence, as it was given on the part of the Defender and taken as undisputed on the part of the Crown, was sufficient to instruct such a possession of the right claimed as is necessary by the law of *Scotland*. Now that law sanctions the right of salmon fishing as vested in an owner of property under a *habile* title when possession of the salmon fishing has accompanied that *habile* title. And that possession the Lord Advocate told us in addressing the House, must be a possession for forty years shewn by the user of taking the fish continuously during that time in the accustomed mode, and exclusive of the right of all other parties, including of course the Crown. Well, I have not much to object to in the law as laid down in that proposition, beyond saying that the question of the "accustomed mode," is open to observation, and it is upon the question of the accustomed mode that the difference will probably be found to exist between the conclusion of the Inner House and the conclusion of the Lord Ordinary, to which your Lordships are, I believe, unanimously of opinion that we also ought to arrive.

That there is evidence here of taking salmon, and evidence of the right to take salmon being claimed by exclusive title, is, I think, beyond all possibility of contradiction. What is there wanting to make out a complete title, unless it be with reference to a requirement of the law as laid down by the Lord Advocate, namely, that the exercise of the right must be in the accustomed mode? I apprehend, my Lords, that the phrase "accustomed mode," cannot be held to mean that for all time a particular mode and no other shall be used for catching fish. The mode must vary from time to time as improvements are suggested. The right cannot be

acquired by fishing by an unlawful mode, or by a casual casting of a line to take fish here and there, or angling for sport.

Lord Selborne :—

My Lords, I agree with your Lordships.

It is said that in cases of this class the evidence of the right to salmon fishing ought to be "clear, continuous, exclusive, and unequivocal." I do not inquire whether this really means more than that there is a strong *onus probandi* laid upon the person making the claim. But in the present case, taking these words most strictly, if the evidence satisfies the last condition, that of being "unequivocal," it satisfies all the rest. It is *clear*, because there is, in truth, no real controversy as to the facts; *continuous*, because it extends over the whole period from 1808 to the commencement of the action in 1872; and *exclusive*, because the right of excluding the public from these fishings was unquestionably asserted and exercised by the owners of the *Logan* estate, and was practically submitted to by the general public. Does, then, the evidence also satisfy the condition of being *unequivocal?* I apprehend that what is required for that purpose is only that the evidence should relate specifically to salmon fishing, carried on in a lawful and proper manner, as distinct from fishing of any other kind. The accidental capture of salmon by persons fishing for other fish would, no doubt, be insufficient to satisfy this condition; but, on the other hand, the capture of white fish by those claiming the right of salmon fishing, or by other persons fishing with their leave, would not prevent acts done for the express and specific purpose of taking salmon from being unequivocal.

It appears to me that the evidence of Colonel *James McDouall* (confirmed as to *Port Logan* by that of *James Goudie*) proves unequivocally (if credit is given to it) the habitual capture of salmon, as of right, by the proprietors of *Logan*, from 1808 or earlier till 1856; and it is not disputed that since 1856 the same right has been claimed and exercised in a manner which, if connected with a sufficient length of previous user, would be enough to establish the Appellant's title. The evidence of Colonel *James McDouall* is not only itself unshaken, but it is confirmed by other witnesses, who speak of acts distinctly and specifically referable to the assertion and exercise of the right of salmon fishing by the proprietors

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of *Logan* at various places on both coasts, and at various times, extending over more than the necessary period. Some of the witnesses who prove these facts are witnesses for the Crown. The known state of the law as to the public right of fishing and drawing nets for white fish is also inconsistent with the supposition that the claim of a right to exclude the public from fishing and drawing nets upon the shores of the *Logan* estate was referable to anything else than an exclusive claim to salmon and salmon fishing, which would render necessary the permission of the proprietor in all cases in which any salmon might be caught and brought to shore, whether by persons fishing for white fish, or by those whose principal object might be the capture of salmon.

Judgment of the First Division reversed, and the interlocutor of the Lord Ordinary restored.

Agent for the Appellant: *Preston Karslake.*

Agent for the Respondent: *Horace Watson,* Land Revenue Solicitor.

1875
May 3.

LEARMOUTH *et al.* . . . . . Appellants;
MILLER . . . . . Respondent.

Wife's Legitim—Husband's Right—Claim of Creditors.

The *legitim* of the wife is the property of her husband and subject to his debts.

A provision without consideration in a post-nuptial contract that the income of the *legitim* "should be alimentary and in nowise attachable for debt," held insufficient to exclude the claim of the husband's creditors, he having become bankrupt.

Per The Lord Chancellor (1):—A stipulation of this kind in a post-nuptial contract is neither valid nor permissible.

Per Lord Hatherley:—A man cannot so deal with his own property as to make a provision to the detriment and defeating of his creditors.

Per Lord O'Hagan:—No man is permitted to filch his own income from the hands of his creditors.

The *Conjugal Rights Act* (2) held inapplicable, as the bankruptcy was anterior.

On the 30th of June, 1845, *John Finlay* married *Mary Anne Alexander* without any ante-nuptial settlement, so that on the

(1) Lord *Cairns.* (2) 24 & 25 Vict. c. 86.

death of her father, in 1851, her *legitim*, £2600, became the property of her husband.

On the 28th of February, 1852, the husband and wife, by post-nuptial trust settlement, provided that the income of the *legitim* should be paid to the husband for life, and, after his death, to the wife; the fee to go to the children of the marriage. These provisions were declared by the deed to be alimentary, "and nowise attachable for debt;" the husband undertaking to pay £1999 "for the purposes of the trust." He was at the time of executing this deed in prosperous circumstances; but in 1860, having got into difficulties from the stoppage of the *Western Bank*, he was declared a bankrupt; and the above Respondent was appointed trustee of his sequestrated estate.

The trustees under the post-nuptial settlement were found entitled to the principal sum of the *legitim* (£2600) by a judgment of the Court of Session, which the House of Lords affirmed in a former litigation (1).

The present action was brought in January, 1871, by the trustee of the bankrupt estate, on behalf of the creditors, for a judicial declaration that they were entitled to the whole interest, dividends, and profits of the *legitim* during the life of the husband, at all events so long as the sequestration of his estates should remain in force.

The defence of the trustees under the post-nuptial settlement (the above Appellants) was that the husband had not fulfilled his obligations under that settlement, and that they were entitled to retain the sums sued for.

The Lord Ordinary (Lord *Mackenzie*) decided in favour of the Pursuer, his Lordship holding that the husband's life-rent of the *legitim* was by the bankruptcy vested in the trustee of the creditors (2). This judgment having been adhered to by the Lower House, the trustees under the post-nuptial settlement appealed to the House of Lords, having for their counsel

The Lord Advocate (Mr. *Gordon*, Q.C.), and Mr. *William Pearson*, Q.C.

(1) *Scottish Jurist*, vol. xlii. p. 418; *Weekly Notes*, 1870, p. 143.
(2) 3rd Series, vol. x. p. 107.

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Mr. *John Pearson*, Q.C., and Mr. *J. T. Anderson*, appeared for the Respondent.

At the close of the argument for the Appellants the following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR:—

The case now brought before your Lordships has produced an amount of litigation which is much to be wondered at and much to be regretted. At the time that the post-nuptial settlement was executed the father of Mrs. *Finlay* had died, and, as one of his children, she was entitled to £2600 under the head of *legitim.* The *legitim* was in law the property of her husband. He might have done anything that he pleased with it. The trust relating to the £2600 is as follows:

> In trust for the payment of the free yearly proceeds of £2600 to the said *John Finlay* during his life for his life-rent use allenarly; and after his death, in the event of his being survived by his wife, in trust for the payment to her in like manner of the free yearly proceeds of the £2600 during her lifetime for her life-rent allenarly. And after the death of the survivor of the said spouses, in trust for the whole children to be born of the marriage; and it is hereby expressly provided and declared that the whole of the foresaid conditions, as well those in favour of the spouses as those in favour of the children, shall be no wise attachable for debt, but that the same shall be considered alimentary.

There is here, my Lords, a cumulative provision that all the trusts shall be considered alimentary; and the meaning of that is that they shall be considered alimentary for each of the persons in succession who are to benefit by the trusts. It is a stipulation with regard to the husband's life-rent use that it shall be in no wise attachable for his debts, but shall be considered alimentary for his benefit. Then the question is, whether a stipulation of this kind in a post-nuptial contract is permissible and valid according to the law of *Scotland?* According to the law of *England* it clearly would be invalid; and, my Lords, as I understand the law of *Scotland,* it is invalid equally by the law of *Scotland.* It is an attempt made by an owner of property to place it in such a position as shall prevent his creditors, or his assignee or trustee in bankruptcy or sequestration, from taking it and using it for the payment of his debts.

My Lords, I asked whether there was any instance where the

owner of property in a contract for valuable consideration could be found entitled to make a provision of that kind. I do not desire, my Lords, to express any opinion whether it could or could not be done; but no instance has, as a matter of fact, been adduced at your Lordships' Bar where it has been held valid. Desiring, as I say, to express no opinion as to whether it could be done or could not be done, what I ask your Lordships' attention to is this—that even although it may be considered that the post-nuptial contract is onerous, and has consideration in it for some of its provisions, I think it cannot be maintained that for this provision made by Mr. *Finlay* with regard to his own property and for his own benefit, there was any consideration whatever moving to him or influencing him. It was a disposition of trust made and created by him for his own benefit, and which he was not moved to create by any consideration paid to him for so doing. It was, therefore, a disposition to be viewed in every respect as one of those dispositions, not admitted by the Scotch law, where a man withdraws, or attempts to withdraw, his own property from the reach of his creditors, or of the trustee in the case of sequestration.

Then, say the Appellants, here is a contract containing various provisions. There is the provision for the life-rent of the husband; there are provisions by the husband by which he is bound to give a bond for £1999 to pay that sum for the purpose of the settlement, to insure his life in the meantime, or give heritable security for the purpose of implementing his obligations; the husband has not done any of those things; it is not right that he should claim the advantage and benefit of the post-nuptial contract, and at the same time be a defaulter in the fulfilment of the obligations which it imposes upon him. Now, my Lords, there is no doubt that there is a principle in the Scotch law, as there is a principle in the law of *England*, as administered in the Courts of Equity, that any person who is a party to a complex contract or obligation cannot be permitted to take the benefits of that contract, and at the same time repudiate the obligations placed upon him by it. That is a principle depending not upon any technical rule of law, but upon the first principles of equity and of justice.

But now, my Lords, let us see how it is proposed to apply that

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rule to the present case. The Appellants' first plea in law describes very aptly the process of reasoning by which that proposition is sought to be supported. That plea says:

> The post-nuptial contract being a mutual and onerous deed, and neither the husband nor the Pursuer, as coming in his place, having fulfilled, or being ready to fulfil the obligations thereby undertaken by him as the consideration and counterpart of the life-rent alimentary provision, the Pursuer is not entitled to recover the sums sued for.

Now, my Lords, is it the fact that the obligations undertaken by the spouse in this case, the obligations to provide the £1999 and to insure his life, and to give heritable security, were undertaken by him "as the consideration and counterpart of the life-rent alimentary provision?" that is to say that, in order to bribe and induce him to undertake to provide the £1999, he retained for himself and put in trust the life-rent provision of his own money. My Lords, the statement in this compendious form of the proposition shews at once how absurd it is. If the life-rent had been given him by some one else, then it might well have been said that that was valuable consideration for the obligations which he undertook. But your Lordships see at once that there was no consideration whatever moving to him as the counterpart of the obligation which he undertook.

The trustee in the sequestration is not claiming this money under the deed at all, although he is claiming it as an interest which is mentioned in the deed.

The next question is, are the Appellants entitled to something under the *Conjugal Rights Act* (1)? That Act came into operation in 1861; the bankruptcy in this case occurred in 1860. If we were to look to those dates alone, it appears to me that the bankruptcy having occurred before the *Conjugal Rights Act* it would be almost impossible, having regard to the mode in which that Act is worded, to apply it to a bankruptcy which had occurred previously, because what it provides is this:

> When a married woman succeeds to property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband or his creditors, or any other person claiming under or through him, shall not be entitled to claim the same as falling within the *communio bonorum*,

(1) 24 & 25 Vict. c. 86. 1861.

or under the *jus mariti*, or husband's right of administration, except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife if a claim therefor be made on her behalf: Provided always, that no claim for such provision shall be competent to the wife if before it be made by her the husband, or his assignee or disponee, shall have obtained complete and lawful possession of the property, or in the case of a creditor of the husband where he has, before such claim is made by the wife, attached the property by decree of adjudication or arrestment.

My Lords, I apprehend that if it were necessary to decide the question, it would be found altogether impossible to apply the Act of 1861 to a bankruptcy which occurred in the year 1860. But I do not consider it necessary to consider that question in the present case.

Upon the whole, therefore, I advise your Lordships that the interlocutors appealed from ought to be affirmed, and the appeal dismissed with costs.

LORD HATHERLEY:—

My Lords, I entirely agree in the opinion that has been expressed by my noble and learned friend the Lord Chancellor. It is clear that by the law of *Scotland* a man cannot so deal with his own property as to make a provision to the detriment and defeating of his creditors. Then, is this a provision coming *aliunde* as a part of the bargain made between the parties to the deed, or is it simply a portion of his own *dominium* over his own property, which portion he has not alienated, and which therefore remains of the same quality as it was before he proceeded to deal with it?

My Lords, the House by its former decision has affirmed the validity of the deed as regards the wife and children (1). The House has said that as regards them the provision made was not excessive, and although that provision was post-nuptial it has affirmed its validity in regard to the wife and children. But the question as to the husband was left open. However, when you look to what was done by the deed, it is impossible, as it appears to me, to contend that the husband has parted with anything more than all the right to the fund which may accrue after his death for the benefit of the parties who are to take it, subject to his

(1) Law Rep. 2 H. L., Sc. 109, and *Scottish Jurist*, vol. xlii. p. 418.

W.N. 1874 143.

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reserving to himself a life interest in it. He parts, in other words, with the reversion. He retains the life interest, and that life interest, so retained, remains his property.

As to the third and only remaining point, with reference to the Scotch *Conjugal Rights Act*, I think it is certainly quite a sufficient answer to say that that Act was so passed in 1861, and that the bankruptcy in this case took place in 1860; because although the Act may be held to have been retrospective as to a woman married before the Act, yet it would be very difficult to suppose that the Act could have been intended to have such an effect as this—that although a right had actually become vested in the trustee under the sequestration, just as if he had purchased the right for valuable consideration from the life renter, yet he should be divested of it, and a fresh settlement made. I apprehend that that would be a sufficient answer to the argument founded upon the Act; but perhaps a still more complete answer is that given by my noble and learned friend the Lord Chancellor, who says that the Act does not contemplate cases where deeds of arrangement have been previously entered into between the husband and wife, but only those cases where no arrangement having been made, it was thought proper that the wife should not be deprived of all interest in the husband's property without some provision being made for her. But when the parties have themselves made such provision there is no necessity for calling in the Act.

On these grounds, therefore, my Lords, I think the appeal should be dismissed.

LORD O'HAGAN.—

My Lords, I am of the same opinion. The case appears to me to be tolerably clear in all its branches.

On the first and main question the law is not disputed, and there is no controversy of fact. An eminent Judge (Lord *Deas*) in *Ker's Trustee* v. *Justice* (1) states the legal principle very lucidly: "No one is entitled to protect his own income against his own onerous obligations and the claims of his lawful creditors." That principle is adopted equally by Scotch and English jurisprudence, and is so based on common sense and justice that it must

(1) 5 Macph. 4.

find acceptance in every rational system of law. But the argument of the Lord Advocate invites us to violate it by holding that the undoubted property of the bankrupt here has been relieved by his own act from the just demands of his creditors. It cannot be so. The words of the deed are unequivocal. The trustees are to hold "in trust for the payment of the free yearly proceeds of the trust estate to the said *John Finlay*, during his life for his life-rent use allenarly." It is impossible to deny that the life-rent so became his own, his own absolutely; and if so, it could not be enjoyed by him disburthened of the obligation to answer honest demands against him. The subsequent clause, on which so much stress has been laid, operates so far as it can have legal operation, but no further; and it was mistakenly argued that because the deed generally had been sustained, every provision in it must be legally effective.

Applying, therefore, plain principle to plain words, I am of opinion that the Court below was well warranted in refusing to defeat the claims of the creditors; and I think the authorities produced by the Lord Advocate and Mr. *Pearson* sustain the conclusion to which it arrived. In *Lewis* v. *Anstruther* (1) the facts bore no resemblance to those with which we have to deal. There, for abundant consideration, a son obtained an annuity charged on his father's property. In *Macdonald* v. *Macdonald* (2), a provision for a wife and children was most properly protected. But in neither of those cases, nor in any other case, has a man been permitted to filch his own income from the hands of his creditors. On the main question, therefore, it seems to me that the decision of the learned Judges was perfectly correct.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Agent for the Appellants: *W. Robertson.*
Agents for the Respondent: *Loch & Maclaurin.*

(1) 14 Dunlop, 857. (2) 1 Macph. 1065.

1875
March 12.

COLONEL McDONALD . . . . . APPELLANT;

AND

McDONALD *et al.* . . . . . RESPONDENTS.

Entail—Resolutive Clause.

An entail impeached on the ground that by reason of doubtful words and ambiguous phraseology in the resolutive clause, it failed adequately to embrace and cover the cardinal prohibitions:—

Held by the House (affirming the decree appealed from) that the resolutive clause was sufficient.

Per THE LORD CHANCELLOR (1):—I cannot admit that there is to be applied to deeds of entail rules of construction differing from the rules of construction which are applied to other instruments.

ON the 18th of July, 1837, Sir *John McDonald* executed an entail of the lands of *Dalchosnie, Kinloch-Rannock,* and *Loch Garry,* in *Perthshire,* in favour of himself and his wife in life-rent; and in favour of his eldest son, the above Appellant, and other substitutes in succession. Sir *John McDonald* died in 1866; and his wife, Lady *McDonald,* in 1872.

On the 10th of September, 1873, Colonel *McDonald,* as the heir in possession, brought the present action, praying the Court of Session to declare that the entail was invalid, and that the property consequently "belonged to him in fee simple." His claim was resisted by his younger brother and three sisters, the above Respondents.

The question turned upon the resolutive clause, which, the Colonel contended, did not adequately apply to the cardinal prohibitions of the entail. The Lord Ordinary (Lord *Mackenzie*) decided against the Colonel, holding that there was no solid ground for impeaching the resolutive clause or challenging the entail. The Second Division confirmed the Lord Ordinary's decision (2).

The following note, explanatory of the Lord Ordinary's judgment, is given fully, as all the Law Peers assented to it, even where he differed from the Court which reviewed his decision:—

The only objection insisted in was that directed against the sufficiency of the resolutive clause, which is in the following terms: "And with and under this

(1) Lord *Cairns.* (2) 4th Series of Scotch Cases, vol. i. p. 858.

See ante p. 482.

irritancy, as it is hereby conditioned and provided, that in case the said *Alastair McDonald*, or any of the other heirs succeeding to the lands and estate before disponed, shall contravene the before-written conditions, provisions, restrictions, and limitations herein contained, or any of them; that is, shall fail or neglect to obey or perform the said other conditions and provisions, and each of them, or shall act contrary to the said other restrictions to be hereinafter added and appointed by me, excepting as is before excepted, then and in any of these cases the person or persons so contravening shall for him or herself only *ipso facto* amit, forfeit, and lose all right, title, and interest which he or she hath to the lands and estate before disponed; and as such right shall become void and extinct, so the said lands and estate shall devolve and accrue and belong to the next heir appointed to succeed, albeit descended of the contravener's own body, in the same manner as if the contravener were naturally dead, and had died before the contravention."

The Pursuer (Colonel *McDonald*) maintains that the entailer makes a distinction between those clauses which are directed against selling or alienating the estate, burdening it with debt, and altering the order of succession, and the other clauses by which the heirs are obliged to use and bear the arms of "*McDonald*," to possess the estates under the entail and no other title, to engross the destination and whole clauses in the titles and investiture of the estates, and to purge and redeem adjudications. The former, it is said, are dealt with in the entail under the name of "restrictions" or "restrictions and limitations," while the latter are denominated "conditions and provisions." And the defect in the resolutive clause is stated to be, that it is not directed against the three cardinal restrictions and limitations, but only against the conditions and provisions last above mentioned.

The Lord Ordinary is of opinion that there are no sufficient grounds for thus limiting the application of the resolutive clause, and that its terms include and are directed against the whole conditions, prohibitions, and clauses irritant and resolutive contained in the deed.

At the outset of the entail, the entailer, "upon the conditions, restrictions, and provisions after specified," conveyed the estates. At the end of the dispositive clause it is set forth that the estates are conveyed "always with and under the conditions, provisions, restrictions, limitations, exceptions, clauses irritant and resolutive, declarations and reservations after-mentioned." The same terms are used in the procuratory of resignation. Then the clause by which the heirs are taken bound to bear the name and arms commences with the words, "with and under this condition always, as it is hereby expressly provided." The clause which relates to possessing under the entail, engrossing the destination and whole clauses of the deed in the titles, and purging adjudications, commences with the words, "as also with and under these conditions that." That part of the prohibitory clause which is directed against altering the order of succession, and which also debars all right of terce or curtesy, commences with the words, "and with and under the restrictions and limitations after written, as it is hereby expressly conditioned and provided." There is an exception in this clause, by which the heir in possession is empowered, on the forfeiture or attainder for treason of any of the apparent or presumptive heirs, to renew the entail, "but with and under the whole conditions, restrictions, exceptions, and irritancies

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herein contained." Then follows the remainder of the prohibitory clause in regard to sale, alienation, and contraction of debt, which commences with the words, "and with and under this restriction and limitation also, as it is hereby expressly conditioned and provided." The two clauses by which the heirs are restrained from doing any act or granting any deed by which the estates may be adjudged, forfeited, or evicted, and by which the heirs are prohibited from letting the lands, with diminution of rental, and on payment of a grassum, for any longer space than the life of the grantor, &c., are called "restrictions and limitations." Then follows a "condition, as it is hereby specially provided and declared," by which the heirs may excamb to the extent prescribed by statute. And the provision that the lands shall not be affected or burdened with, or adjudged or evicted by or for, the deeds and debts of the heirs, is styled a "limitation and condition." The resolutive clause also commences with the words, "and with and under this irritancy, as it is hereby conditioned and provided." And by the irritant clause "all debts contracted, deeds granted, and acts done contrary to the conditions and restrictions," are declared null.

It is impossible, the Lord Ordinary thinks, to read the entail without being satisfied that it does not afford any sufficient grounds for the Pursuer's argument, and that the entailer does not deal with "conditions and provisions" as one thing, and "restrictions and limitations" as another; but that, on the contrary, the words "conditions and provisions" are used in the resolutive clause as applying to the whole conditions, prohibitions, and clauses irritant and resolutive of the entail. This appears not only from a consideration of the whole deed, but also from a consideration of the manner in which these words are used in the resolutive clause.

It is not disputed that the first part of the resolutive clause is sufficiently general to cover all acts of contravention. But it is said that these general terms are limited by the definition which follows them, namely, "that is, shall fail or neglect to obey or perform the said other conditions and provisions, and each of them." The use of the word "other" creates no difficulty, seeing that it has been held in the case of *Stirling* v. *Moray* (1) that this word must be held as referring to the resolutive clause itself, which is a condition and provision of the deed, distinct from the "before-written conditions, provisions, restrictions, and limitations," or as referring to the irritancy condition and provision which immediately precedes the resolutive clause, and which binds the heirs to purge adjudications, and resolves their right in the event of failure to do so within a specified time. Now, that being the case, the words "the said other conditions and provisions" can only mean in this entail the aforesaid conditions and provisions, that is, those which are immediately before specified in the resolutive clause itself as "the before-written conditions, provisions, restrictions, and limitations." The entailer, therefore, has in this clause itself defined what he includes in and means by the words "conditions and provisions." Farther, that meaning is in exact accordance with the import and effect of the word "provision," which is of the most comprehensive nature, and includes the whole terms and stipulations of a deed, including the fetters of an entail.

The Pursuer further maintained that the words in the resolutive clause, "shall

(1) 7 Dunlop, 640.

fail or neglect to obey or perform," are insufficient to cover contravention of the cardinal prohibitions, and that they can only be held as applying to failure or omission to perform those conditions first mentioned in the deed, such as taking the name and arms, and possessing under the entail, which are to be implemented *faciendo*, and that accordingly they limit the signification of the words "conditions and provisions" to those conditions. The Lord Ordinary is of a different opinion, and he considers that the words "fail to obey," "neglect to perform," are in themselves sufficient to cover not only every neglect to perform those positive conditions, but also all acts of an heir done in contravention of the three cardinal prohibitions.

The words which follow those already noticed in the resolutive clause do not, it is thought, restrict in any respect the meaning and application of the prior part of the clause. These latter words are—"or shall act contrary to the said other restrictions to be hereinafter added and appointed by me." There is nothing inconsistent here with the preceding part of the clause. The restrictions here mentioned are the provisions which may be "hereinafter added," and they are those set forth in the latter part of the deed. The Pursuer maintained that after the word "restrictions" there had been an omission of the words "hereinbefore contained or any other restrictions," and that the insertion of these words is necessary to make a valid resolutive clause. The Lord Ordinary can find no warrant for this supposition. The question is, not whether anything is omitted, but whether the clause, as it stands in the deed, is sufficient to meet the provisions of the Act, 1685, c. 22, which requires, in order to an effectual entail, "irritant and resolutive clauses, whereby it shall not be lawfull to the heirs of tailzie to sell," alienate, burden with debt, or alter the order of succession.

The Lord Ordinary considers that the concluding part of the resolutive clause also confirms the view which he has taken of the clause, because it is thereby provided that "then, and in any of these cases, the person or persons so contravening" shall forfeit all right to the estate.

The case of *Holmes* v. *Cunningham* (1), founded on by the Pursuer, is not, it is thought, in point. The decision in that case proceeded upon the failure to insert the resolutive clause of the entail in its integrity in the charters and sasines by which the entail was feudalized. No doubt some of the Judges who decided that case gave opinions as to the effect of the resolutive clause in the charters, supposing it to have occurred in a deed of entail. But the structure of the entail in the present case is altogether different, so that these opinions are inapplicable. The case of *Adam* v. *Farquharson* (2), the resolutive clause in which is very similar to that now under consideration, supports the view taken by the Lord Ordinary of the import and meaning of that clause in the present entail.

The prohibitory and irritant clauses appear to the Lord Ordinary to be in all respects valid and effectual.

On the appeal to the House, Mr. *Cotton*, Q.C., and Mr. *Marten*, Q.C., were heard for the Appellant; and Mr. *John Pearson*, Q.C., and Mr. *Trayner* (of the Scotch Bar), for the Respondents.

(1) 13 Dunlop, 689. (2) 2 Dunlop, 1162; 3 Bell's App. 295.

1875

McDONALD v. McDONALD.

The Law Peers delivered the following opinions:—

THE LORD CHANCELLOR:—

My Lords, there are no cases which have afforded greater room for the exercise of the astuteness and skill of counsel in matters of construction than those which concern the stringency of the clauses in Scotch deeds of entail, and the present is certainly not an exception from that general observation. But I am bound at the same time to say that if the questions which have been raised upon the construction of the deed now before your Lordships had been raised upon the construction of any instrument which was not a deed of entail, they would have appeared to me to have created no serious difficulty. I cannot, however, admit that there is to be applied to deeds of entail a rule of construction altogether differing from the rules of construction applicable to other instruments. I am quite satisfied with the principle that fell from the late Lord *Wensleydale* in the case of the *Kintore Entail* (1), when it was before your Lordships' House. Lord *Wensleydale* there said:—

> If an expression in an entail fairly admits of two meanings, both equally technical, grammatical, and intelligible, that construction must be adopted which destroys the entail rather than that which supports it. But this rule does not authorize you to put on any expression a forced, unreasonable, or ungrammatical construction in order to defeat the entail. You must first construe the instrument according to its fair meaning, and if that leaves two courses open, freedom of disposition must prevail.

I propose to your Lordships, first, to construe this instrument according to its fair meaning. If upon a construction according to its fair meaning two courses are left open to your Lordships, by all means let that be adopted which will favour freedom of disposition.

It is argued that in this deed there is a clear distinction drawn between sentences which are to be termed "conditions and provisions," and sentences which are to be termed "restrictions and limitations," and that in the last clause no reference is made to "restrictions and limitations."

Now, let us inquire whether there is a distinction drawn through-

(1) 4 Macqueen, 529.

out between "conditions and provisions," on the one hand, and "restrictions and limitations" upon the other? My Lords, I arrive at a very different conclusion. The deed commences by stating that the settlement is made "with and under the conditions, provisions, restrictions, limitations, exceptions, clauses irritant and resolutive, declarations, and reservations after specified;" and then follows this: "With and under this condition always, as it is hereby expressly provided." There we have a "condition" ranged under the head of a "provision." Then you will find these words, "and with and under the restrictions and limitations after written as it is hereby expressly conditioned and provided." Here we have what we are in search of, namely, "restrictions and limitations" treated as exactly synonymous, at all events, as ranged under "condition and provision." "Condition and provision" is perhaps not treated as being merely synonymous with "restriction and limitation," but as the larger and more comprehensive phrase of the two. Then we find this, "and with and under this restriction and limitation also as it is hereby expressly conditioned and provided." There we have "condition and provision" again carrying in it "restriction and limitation." And we have that which is a restriction expressly called a provision, "provided always that it shall not be in the power of any of the said heirs to set any tack of the manor place," &c. And again, "with and under this condition as it is hereby specially provided and declared," putting "condition" under the head of "provision and declaration," "and also with and under the limitation and condition"—"condition" and "limitation" being used synonymously; "with and under the irritancies following as it is hereby expressly conditioned and provided." So that you have the word "irritancy" treated as a condition or provision.

My Lords, I have gone through those examples, which will be sufficient to shew your Lordships that it would be altogether a mistake to suppose that there had been any distinction drawn in an earlier part, or in any other part of this deed, between "restrictions and limitations" on the one hand, and "conditions and provisions" on the other. They are treated as synonymous, and the word "providing" is treated throughout as the most comprehensive introduction that can be given for any and every of the clauses

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of the deed. If there is nothing in any other part of the deed which limits you in the construction which is the natural construction of a term, I ask your Lordships what reason is there why, in this particular sentence, the words should be so limited?

But, my Lords, is there not something more? I still continue to omit for the present the words, "or shall act contrary to the said other restrictions to be hereinafter added," for the purpose of carrying your Lordships on to a clause which follows those words, namely, "excepting as is before excepted." Those words obviously cannot refer to "restrictions to be hereinafter added," because there could be no "excepting as is before excepted" from that which had not been mentioned at all before, but was to be mentioned afterwards. Those words, "excepting as is before excepted," must therefore refer to what is called "the said other conditions and provisions." But what was there in the nature of an exception in the earlier parts of the deed, and from what was the exception excepted? From nothing whatever that is mentioned before except from restrictions and limitations. There were exceptions, two in number, from restrictions and limitations, and there were no other exceptions whatever. Therefore you have in those few words that which absolutely constrains your Lordships to give to "conditions and provisions" a meaning which would include within them "restrictions and limitations."

Now I will ask your Lordships to observe how authority stands as to the word "other" in the sentence, "shall fail or neglect to obey or perform the said *other* conditions and provisions and each of them." Does that impose any difficulty in the way of holding that the failing or neglecting to obey or perform applies to all conditions and provisions which went before? My Lords, it was decided in a case which was cited at the Bar with respect to the *Abercairnie* entail, the case of *Stirling* v. *Moray* or *Home-Drummond* (1), among other things, that in an entail which contained the words "shall contravene the other before written conditions and provisions, restrictions and limitations," the word "other" was not an inappropriate word; that it merely meant to express a reference to the clauses of the deed which went before, other than the resolutive clause itself, which was in the nature itself of either

(1) 28 May, 1845; 7 Dunlop, 640.

a restriction or a condition. That appears to be a case which has always been approved in the Scotch Courts, and the effect of that authority would be to give a natural and proper meaning to the word "other" in this clause.

But even if there were not this authority for such an explanation of the word "other," I am not myself clear that that word might not be held here to have naturally a reference prospectively to further provisions of the settlor as to restrictions afterwards to be imposed, just as we often, in language which perhaps is not altogether inaccurate, speak in anticipation in the first part of a sentence, using the word "other" in contradistinction to some exception which is made in the latter part of the sentence.

I will next turn to those words which I omitted in the first instance, namely, "or shall act contrary to the said other restrictions to be hereinafter added and appointed by me." Much argument took place upon these words, but I am not sure that I myself have been able to appreciate the force of that argument. It appears to me that the observations are quite just, that there is a use of the word "said" in this clause of the sentence which makes that word inappropriate having regard to what is spoken of. But it appears to me that any inaccuracy in the use of the word "said" is corrected by the words "to be hereinafter added and appointed by me." Those words are so clear and so unambiguous that there can be no doubt as to what they point to, and if before the use of those words you have the word "said" applied to "restriction," I apprehend that the later words, being so clear, must correct the earlier words. But even if it could be made out, as I do not think it is made out, that there was ambiguity in this particular clause, it does not appear to me that it would in any way operate to make invalid or imperfect or inefficacious the earlier words of the sentence "other conditions and provisions," which, in my opinion, must be applied to the whole of the conditions, provisions, restrictions, and limitations contained in the earlier part of the deed.

My Lords, those are the observations which would have occurred to me if this case had come before us in the first instance not governed by any particular authority. But I am unable to distinguish the present case from the case of *Adam* v. *Farquharson*,

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which case came before your Lordships' House in 1844. In that case Lord Chancellor *Lyndhurst* said (1):—

> The objection raised was as to the sufficiency of the resolutive clause, that it did not apply to the restrictions and limitations contained in the prohibitory clause. The objection is founded upon a supposed distinction made by the entailer between the conditions and provisions stated in the deed and the limitations and restrictions which it also mentions. The resolutive clause, it is contended, is confined to the former, and does not therefore prevent the altering the order of succession, or the sale of the estate, or the burthening it with debts. It does not appear to me that there is any real difficulty in the interpretation of this clause. It begins by declaring, "That in case any of the heirs of tailzie shall contravene any of the before-written conditions, provisions, limitations, or restrictions," and then proceeds thus, "that is, shall fail or neglect to obey and perform the haill conditions and provisions above set down, or any of them." It is clear that the word "provisions," which is general enough to include limitations and restrictions, was here intended to include them.

I pray your Lordships to observe the reasoning which satisfied Lord *Lyndhurst*: "For otherwise this part of the clause would be inconsistent with the former, which could not have been the intention of the framer of the deed." And Lord *Brougham*, in the same case, said:—

> The resolutive clause is itself called a provision. It begins with these words: "It is expressly *provided* and declared." In truth, "provide" and "provision" are words, both in legislative enactments and in the framing of deeds, of the largest extent and import; they cover everything that can be enacted in a statute or enumerated in a deed.

Fortified by that authority, and supported by the considerations which I have endeavoured to express to your Lordships, I certainly arrive at the conclusion that we have here, under the words "that is," and under the words that follow it, nothing whatever which falls short of a repetition of that which occurred in the first member of the sentence, "shall fail or neglect to obey or perform the said other conditions and provisions." It appears to me to point to a "failure or neglect to obey or perform" any of the conditions, provisions, restrictions, or limitations of the deed. I understand that this was the view of the Lord Ordinary. The Court of Session arrived at the same conclusion, but by a different process. I myself am unable to adopt the construction which the Court of Session appear to me to have been inclined to adopt. I not only

(1) 3 Bell's App. Cases, 304.

prefer the construction of the Lord Ordinary, but, in my opinion, that construction was the right construction, and the interlocutor which he pronounced was entirely right. I submit to your Lordships that this appeal ought to be dismissed with costs.

LORD HATHERLEY:—

My Lords, upon the consideration of the whole case, I agree in the conclusion at which my noble and learned friend the Lord Chancellor has arrived.

LORD O'HAGAN:—

My Lords, I wish to be understood as founding my opinion rather on the view of the Lord Ordinary and the reasons by which he sustained it, than on those adopted by the learned Judges of the Inner House.

LORD SELBORNE:—

My Lords, I entirely agree with the very able judgment of the Lord Ordinary in this case, and with the opinion that has been delivered to your Lordships by my noble and learned friend on the woolsack.

Interlocutors affirmed, and appeal dismissed with costs.

Agents for the Appellant: Messrs. *Loch & Maclaurin.*
Agents for the Respondents: Messrs. *Grahames & Wardlaw.*

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May 4. CRAWFORD . . . . . RESPONDENT.

Bill of Exchange—Discharge of the Acceptors—Indorsers still bound, but their Rights intact.

Held, by the House, affirming the judgment appealed from, that a release to the acceptors by the holder of a bill which had been dishonoured and protested, did not discharge the indorsers; the holder retaining the bill, and expressly reserving his claim against any obligants other than the acceptors; who, though exonerated by the holder, continued still subject to the claims of the several indorsers.

THE *Scottish Granite Company* gave their bill of exchange for £200 to *William Cleland;* who indorsed the bill to *John Holmes;* who indorsed it to the above Appellant, Mr. *Muir;* who indorsed it to the above Respondent, Mr. *Crawford;* who paid the money to *Cleland.* The bill when due was dishonoured and protested; the *Granite Company* becoming bankrupt in September, 1866.

By a document dated the 28th of May, 1872, Mr. *Crawford* on receipt of a partial payment, renounced all his claims against the company and the liquidators thereof; retaining the bill, and reserving entire his claims against any obligants other than the company;" in short, discharging the acceptors of the bill but not the indorsers, of whom the last, Mr. *Muir*, was sued by Mr. *Crawford* for payment of the £200. The main defence was that, by discharging the acceptors, the Pursuer had in effect discharged the indorsers; but the Court of Session decided that, although the acceptors were exonerated from the claims of the holder, they were still subject to the claims of the several indorsers, whose rights and liabilities remained unchanged (1).

Against this judgment the Defender, Mr. *Muir*, appealed to the House, having for his counsel Mr. *Meadows White* and Mr. *Ernest Silvester*, who cited *Webb* v. *Hewitt* (2), decided by Vice-Chancellor *Wood*—a case on which Lord *Hatherley* comments (3).

(1) Scotch Rep. 4th Series, vol. i. p. 93.
(2) 4 K. & J. 438.
(3) *Infra*, p. 459.

[They also cited *Nicholson* v. *Revill* (1); *Price* v. *Barker* (2); and *Bateson* v. *Gosling* (3).]

Mr. *Nevay*, of the Scotch Bar, was heard for the Respondent, citing, among other authorities, *Owen* v. *Homan* (4), and the following passage from Mr. *Chitty's* work on Bills (5):—"A release to the acceptor discharges the other parties; but if there be a reservation of the right to sue the other parties the Court will give effect to the reservation" (6).

At the close of the argument the following opinions were delivered:—

THE LORD CHANCELLOR (7):—

My Lords, when this case came before the Court of Session the record was, on the application of the Defender (the present Appellant) opened for the purpose of allowing a new defence to be put in. The new defence was that, after the bill sued upon had become due, and while it still remained unpaid in the Pursuer's hands, "the Pursuer, without communication with the Defender, freed and released the acceptors of his whole claims against them by a discharge dated the 28th of May 1872, whereby he renounced and discharged any claim which might otherwise have been competent to him against the Defender." The following plea was added by the Defender in the Court below: "The Pursuer having discharged the acceptor of the said bill, and thereby renounced any claim which might otherwise have been competent to him against the Defender, the Defender is entitled to absolvitor."

The Court of Session decided that the defence was not a sufficient one to absolve the Defender; and the question before your Lordships is, whether the Court of Session were right in coming to that conclusion.

Now there is no doubt that it is competent for the holder of a security of this kind to agree with the principal debtor not to enforce his remedies against him; and, if he does so by an apt

(1) 4 Ad. & El. 675.
(2) 4 El. & Bl. 761.
(3) Law Rep. 7 C. P. 9.
(4) 4 H. L. C. 997.
(5) 10th Ed. p. 289.
(6) See the judgment of Lord *Moncreiff*, 4th Series, vol. i. p. 93.
(7) Lord *Cairns*.

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instrument, which at the same time reserves his rights against those who are liable in the second degree, there will be no discharge of those persons. The principal debtor will not be entitled, if he should be sued by the surety, to say: "You have discharged me completely from the debt; but I am now sued by a person who was surety, and that is inconsistent with the discharge which I received from you." If those persons who were co-obligants with the *Granite Company* should afterwards sue for indemnity, the production of this instrument would at once shew that there was nothing in it inconsistent with such proceedings; because the claims of the Pursuer, *Crawford*, were reserved entire against the persons who were sureties. These principles have been decided not merely in the case of *Owen* v. *Homan* in your Lordships' House (1), but in many cases which have followed subsequently; and it appears to me that the Court of Session were entirely right in the conclusion which they arrived at.

It is very singular that in the argument before the Court below no notice appears to have been taken of a sum of £70, a deduction to be made as a part payment of the principal bill of £200. But when the objection that the £70 should be allowed was brought forward at your Lordships' Bar, it was admitted by the learned counsel for the Respondent that that allowance ought to be made. The interlocutors stand at present as interlocutors decerning the payment of the whole £200; but that is an error, the occurrence of which is to be regretted.

Under these circumstances, although I submit to your Lordships that upon the other parts of the case the Appellant is in the wrong, and ought not to be successful, still the interlocutors ought to be rectified as regards the £70; and I shall therefore submit to your Lordships that an order should now be made by your Lordships' House that

It being admitted that the sum of £70 mentioned in the 4th head of the statement of facts of the Appellant was paid on account of the bill of exchange for £200 as therein mentioned, Declare that the interlocutors appealed from ought to be varied, so far as they or any of them decern payment of the sum of £70; Remit the case with this declaration to the Court of Session.

There being upon the face of the interlocutors this error, I cannot say, although the Appellant has failed in what I have no

(1) 4 H. L. C. 997. 17 Jun 861.

doubt was supposed to be the main part of his case, that your Lordships ought to do otherwise than abstain from making any order as regards the costs of the appeal.

LORD CHELMSFORD:—

My Lords, I entirely concur.

LORD HATHERLEY:—

My Lords, I will make one single observation only upon the case which was cited at the Bar as having been decided by myself in the Court of Chancery (1), upon the question as to the effect of a principal debtor being discharged when the rights against the surety are reserved. I never entertained any doubt upon the general principle, which has been settled over and over again by authority; and on looking at the report of that case I see exactly what occurred there. The discharge was not in the form in which it is here—that is to say, taking part payment and discharging the rest, but there was a purchase by the creditor of all the property of the principal debtor, and that property so acquired by the creditor was taken in discharge of the debt that was due to him; and though he said that there ought to have been in the deed that which there was not, namely, a clause reserving his rights against the surety, and that such a clause had been omitted by mistake, I held that, had it been there, the rule would not have been applicable to a case where it is impossible to say how much the debtor's estate was worth, or to say that it exceeded, or that it fell short of the amount of the debt in question. The creditor had taken it for what it was worth, and had taken it in satisfaction. Therefore, my Lords, the questions which have been argued here could not possibly arise in such a case as that.

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With regard to the judgment in the present case, I entirely concur in what has been proposed by my noble and learned friend on the woolsack.

The following judgment was pronounced by the House:—

It being admitted that the sum of £70, mentioned in the fourth head of the statement of facts

(1) *Webb* v. *Hewitt*, 3 K. & J. 438.

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of the Appellant, was paid on account of the bill of exchange for £200, as therein mentioned: It is declared, that the interlocutors, complained of in the said appeal, be varied, so far as they or any of them decern for payment of the said sum of £70: And it is Ordered, that the said cause be remitted back to the Court of Session in *Scotland*, to do therein as shall be just and consistent with this declaration and judgment.

Agents for the Appellant: Messrs. *Cruse & Sandes.*
Agent for the Respondent: Mr. *James Lamond.*

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MAGISTRATES OF PEEBLES . . . . . APPELLANTS;
THE MINISTER AND KIRK SESSION OF PEEBLES. . . . . } RESPONDENTS.

Bells for Church and Town—Not for Dissenters.

On the re-erection of the *Peebles* Church towards the end of the last century, the heritors of the parish and the magistrates of the town agreed that a steeple to be annexed to the church should be raised at the cost of the town, the bells to be employed for the parish as well as for the town:—

Held, by the House, that the bells should be rung for the purposes of the church and for the purposes of the town, but not for the purposes of dissenting congregations.

BY an agreement of the 16th of February, 1779, between the heritors of the parish of *Peebles* and the town council, it was arranged that a new parish church should be built; that the heritors should contribute £300 to execute the work; that the burgh should do the rest; and that certain bells belonging to the burgh should be placed in the steeple to be erected at the east end of the church, with a stipulation that "the bells should be employed for the parish as well as for the town."

The new church was built, and opened in 1784. The steeple was also erected, and the bells placed in it were constantly, till 1873, used for the parish as well as for the town, and for no other purposes.

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But on the 12th of October, 1873, the magistrates of *Peebles* resolved that the church bells should be rung for various denominations of dissenting congregations within the burgh.

The minister and kirk session (the above Respondents) applied to the Court of Session for an interdict, which was refused by the Lord Ordinary (1), but ultimately granted by the First Division of the Inner House, who, on the 10th of July, 1874, pronounced the following interlocutor:—

The Lords prohibit and discharge the magistrates and council of the burgh of *Peebles* from causing the bells in the steeple of the parish church to be rung on Sundays or national and parochial fast-days, except for the purpose of calling the public to worship in the said parish church, at such hours as may be fixed by the minister and kirk session, and except on occasion of funerals or fires.

Expenses were awarded against the magistrates; who thereupon appealed to the House of Lords; having for their counsel Mr. *Cotton*, Q.C., and Mr. *C. J. Pearson*, of the Scotch Bar.

Mr. *Pearson*, Q.C., and Mr. *W. E. Gloag*, of the Scotch Bar, were heard for the minister and kirk session.

At the close of the argument the following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (2):—

What your Lordships will have to consider in this case is the proper construction to be placed upon a contract entered into in the year 1779 between the parish of *Peebles* and those who represented it on the one hand, and on the other hand, the town represented by the municipal authorities. That contract appears to constitute what in this country would be termed a trust for public or charitable uses. And in this country possibly the case might have assumed the form of a proceeding for the administration of that trust. But in the form in which the case comes before your Lordships, the same end will have to be arrived at through the construction of the contract to which I have referred.

Now, in order to place that construction upon the contract, your Lordships, as it seems to me, will have to look, in the first

(1) Lord *Shand*. (2) Lord *Cairns*.

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instance, at the position in which the parties stood at the time when it was entered into. The town of *Peebles* at that time had an old building or belfry, in which were two bells which clearly belonged to the town, and were used for town purposes. That belfry had fallen into decay; and apparently the time had arrived at which it must either be reconstructed or some other provision made for the housing and use of the bells. The old church was in a ruinous condition, and had to be rebuilt. It does not appear very clearly whether there were any bells, or what bells there were in it, or whether they were in a condition which would have made them available for a new church which it was desired to erect. The obligation to erect it would fall, by the law of *Scotland*, upon the heritors, including the burgh, so far as it was itself an heritor. The same law would have thrown upon the heritors the obligation of providing or furnishing the new church with a proper bell; but the law would cast no obligation upon the heritors to provide a steeple for the reception of the bells, or to ornament the church in any way with a steeple as part of its architecture.

Under these circumstances it appears to have been considered desirable by the town to secure a habitation for their bells; and in order to do this, they were not unwilling to provide for the expense of constructing the steeple to the new church, which could not have been thrown upon the heritors against their will. The arrangement which was proposed by the town for this purpose is evidenced in the first instance by a minute of the 12th of May, 1778, which states that

> The council appointed the provost and bailies of the burgh to meet with the heritors of the parish, and to agree with said heritors either to repair the old or to build a new church; and in case of a new church to be built on the *Castle Hill*, they allow the said provost and bailies, or any of them that shall attend the meeting, in their name to become bound to pay their said proportion of the building, providing that the steeple for their clock and bells shall be carried up with the building of the church, and the town shall be obliged in that case to pay any additional expenses that said steeple shall occasion.

This minute, which obviously is in the nature of an offer, amounts to this: There is a site which is from its nature the most desirable site for the erection of a church and for the housing of these bells. If you, the heritors, will abandon the scheme of

repairing your old church and will build a new church, and not only build a new church but build it on the *Castle Hill*, we, the town, will contribute our share of the expense. And if the *Castle Hill* is made a place where our bells shall be received, we will provide the steeple and carry it up to the proper height as a part architecturally of the church, providing the funds to meet the expense of doing so. This is therefore an offer in which a town asked as the consideration which was to move them, a right to erect upon the situation, as part of the church, a steeple to receive their bells.

On the 16th of February, 1779, the meeting took place between the heritors and those who represented the town, on which occasion the opinion of the town council was laid before them, to the effect that a new church ought to be built, and that the burgh should contract with the heritors for building it, in case the heritors would give £300 as their proportion for building and finishing the said church. And that a steeple was "to be carried up on the east end of the church, which steeple, when finished, with the bells, etc., therein, was to be the sole property of the burgh for ever, the bells, however, to be employed for the parish as well as the town."

Now, my Lords, it is the construction of these last words that is in question. What was the meaning of this stipulation—"the bells to be employed for the parish as well as the town?" I apprehend that the meaning clearly was this: We, the town, have bells which are now in our own separate belfry, and we use them for town purposes. We have no desire to use them for any other purposes, but we consider that a most desirable site to obtain possession of for these bells would be in a steeple, which architecturaliy will become part of the parish church. We offer to the parish church to build that steeple, to incorporate it with the parish church, and to do this at our own expense, provided they will receive the steeple, and allow it so to be incorporated. In that steeple we shall have our own bells. We tell the parish that we shall use them, as we have done hitherto, for town purposes, and we make a right on our part so to use the bells part of the bargain. Says the parish, on the other hand, We are about to erect a new kirk—we are willing that the steeple which the town

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requires shall be incorporated in the new kirk—we should be entitled to assess the parish for the purpose of providing a bell for parish purposes, and providing for its suitable accommodation in some way in the kirk, but we are willing to take this offer of the town council, provided the town council will put us in as good a position as we should have been in if we had had a bell provided by ourselves, and at our own expense; that is to say, we shall have the use of these bells put by the town into the steeple, for parish purposes, as we should have had the use of our own bell if we had provided it, and put it up in the kirk. That appears to me, my Lords, to be both the natural meaning of the words which I have read, and also exactly the natural arrangement which would have been made under those circumstances between two such bodies as the town and the parish.

The agreement was acted upon accordingly. The kirk was built, and the steeple was built; and in the steeple were placed the bells of the town. Everything appears to have gone on harmoniously until a very recent date. The parish kirk had divine service on Sundays at a quarter past eleven (as I understand it) and at two, and the bell was rung for these services at eleven and a quarter before two. On that there is no dispute. In the parish kirk there is no service in the evening, but there is service in the evening in some other places of worship in the town, and notably, as I understand, in the free kirk at 6 o'clock. And the town council have come to a resolution that the bells in the steeple of the established kirk shall be rung at a quarter before six, with reference to the worship which is to take place in the free kirk at six o'clock. It was this claim on the part of the town council which led to the institution of the action in this case, for the purpose of restraining that ringing of the bells.

My Lords, it appears to me that there are two points of view in which that claim of the town council is to be looked at. In the first place, if I am right in saying that the contract was that the town should have the right of ringing these bells for town purposes, and only for town purposes, is this purpose to be called a town purpose? Is it to be called a town purpose that the town council should say: We will look to the interests of one denomination, or of more denominations than one; we will observe the

time at which they have public worship on Sundays, and we will insist upon our right of ringing the bells in the steeple of the established kirk, for the purpose of summoning those who wish to attend the worship of other denominations. But, my Lords, is the ringing for the worship of a particular denomination other than that of the kirk of the parish, a purpose of the town? It appears to me that it cannot be considered to be a municipal purpose. It cannot be said that it is part of the duty of the municipality to provide a bell for the purpose of summoning to the worship of a particular denomination those who are anxious to attend that worship.

But another consideration arises. I took the liberty of saying that the result of the agreement with regard to the parish was that it must be taken that it was said in substance, by the words of the contract, that the parish should be in as good a position *quoad* these bells for parish purposes as if they had a bell or bells of their own, and provided at their own expense, in the kirk. What is the purpose, with regard to public worship, of parish bells? The purpose obviously is this, that they are to sound forth upon the day or days appropriated to public worship in a way which shall indicate to those who hear them that as soon as the bell or bells cease ringing the worship in the church over which the bells are ringing is to commence. And, my Lords, if in the church over which the bells are placed, the bells are rung at a time which has no reference to the worship in that church, but has reference to something which is taking place elsewhere, you not merely are not satisfying the purpose of the parish, but you are defeating the object of the parish, and the object with which the bell is placed above the parish church.

So far as the ringing of the bells at eleven and at a quarter to two is concerned no question arises. Those hours happen to synchronize with the hours of worship of other denominations in the town, and the bell which rings for the parish church at those hours may well answer the purpose of informing the public that the hour is approaching when there will be service in the other places of worship. But observe the consequence with regard to the ringing of a bell at a quarter to six o'clock. Any person who hears that bell ought to be under the impression that it is an announce-

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ment made from the parish church that at the end of the tolling, worship will commence there. He goes to the parish church; he finds it shut up. If he can procure any information of what the state of things really is, he is told there that the bell is ringing not for the worship of the parish church, but for the worship to take place in some different building in some other part of the town. Therefore, not only is the ringing of the bell not serving a parish purpose, but it is defeating a parish purpose; for it is misleading the parishioners into the belief that there is going to be worship at the parish church, where there is not going to be any such worship.

Therefore, my Lords, both upon the ground that the town is claiming to use the bells for a purpose which is not a town purpose, and also upon the ground that it is using the bells for a purpose which interferes with and defeats the object of the bells as parish bells, upon both of these grounds it appears to me that the use claimed to be made of these bells by the town council is not a use warranted by the contract of 1779.

My Lords, that really exhausts all that I will trouble your Lordships with upon the merits of the case. The interlocutor of the Court of Session appears to me in substance to be correct. I am inclined, however, to submit to your Lordships that the interlocutor has not assumed the most happy form, and that it has unnecessarily concerned itself with the question of funerals and of fires, upon which really no evidence has been adduced which is material, and by the introduction of which words it appears to me that some confusion and difficulty might hereafter arise. If your Lordships concur with me upon the main question in the case, I shall submit to your Lordships that the interlocutor of the 10th of July, 1874, should be varied so as to restrain the town council from ordering the bells to be rung on Sundays or national and parochial fast days for the purpose of intimating worship or calling the public to worship elsewhere than in the said parish church at such hours as may be fixed by the minister and kirk session, following the words of the interlocutor thenceforward.

Some distinction was attempted to be drawn between the two bells which were placed in the steeple at the time it was built and a third bell which has since then been added to the original two

bells. As to this third bell it was contended that it clearly belonged to the burgh, and that it did not come within the contract or trust which was created by the minutes of the year 1779. It appears to me that the Appellants must choose between one of two things. Either this third bell must be taken to be an accretion to the cumulus of bells which are spoken of in the contract of 1779, and to have become subject to the trusts and obligations of that contract, or, if it is to be held free from that contract, the only result will be that the town council must remove the bell from the steeple. I give no opinion as to their right to do that; but whether they have the right to remove it, or whether it is allowed to remain there, it appears to me clear that it must be subject to the same rules which govern the original two bells.

My Lords, I shall move your Lordships that the interlocutors complained of be not reversed, but that the interlocutor of the 10th of July, 1874, be varied in the way I have mentioned; and inasmuch as the alteration deals with that which was not the real subject of the appeal, and as the Appellants appear to me to have been in the wrong in their appeal, I shall submit to your Lordships, and move, that the interlocutors be affirmed in other respects with costs.

LORD CHELMSFORD:—

My Lords, the question of the town council's claim of right to control and regulate the ringing of the bells in the steeple attached to the parish church depends entirely upon the terms of the agreement between the heritors and the town council of the 16th of February, 1779.

The church was built at the joint expense of the burgh and of the heritors, the heritors agreeing to contribute £300, and they were to possess one-third part of the church, and the burgh the other two-thirds, and the parties stipulated that a steeple should be carried up on the east end of the church, which steeple, when finished, with the bells, &c., therein, was to be the sole property of the burgh for ever, the bells, however, to be employed for the parish as well as the town. The steeple in which the bells are placed is structurally part of the parish church. If the burgh had not placed any bell in the steeple, the heritors would have been bound by law to have provided a bell

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for the purpose of summoning the congregation to public worship in the parish church.

The burgh having placed their own bells in the steeple, and stipulated that they were to be their sole property, the heritors would not have been discharged from their legal obligation unless the town council had appropriated the bells to the same purpose as a bell placed in the church by the heritors must have been applied to. They therefore agreed that the bell should be employed for the parish as well as for the town, which can have no other meaning than this, that the bells were to be used for the same purpose as if they had been put up by the heritors, which of course would be for the use of the parish church only.

The parochial use of the bells is distinct and is distinguished from the town use. To say that the ringing of the bells on Sunday at hours to suit the different congregations of various denominations is for the benefit of the town generally, and therefore a town purpose, is to confound the two uses for which the bells may be employed, the parish use which is necessarily ecclesiastical, and the town use which is necessarily secular.

Although the exclusive use of the bells in connection with the worship in the parish church for nearly one hundred years cannot control the words of the agreement, nor perhaps interpret its meaning, yet it is impossible not to feel fortified in the construction which I have put upon the agreement by the fact that it has been adopted and acted upon for so long a period by both the contending parties without doubt or question.

I agree with my noble and learned friend that the interlocutors ought to be affirmed with the variation which he has proposed.

LORD SELBORNE:—

My Lords, the only material facts (beyond the agreement of 1779 itself) appear to me to be these; First, that the bells in question have been lawfully placed in a steeple, which, though vested in point of property in the magistrates, is still an inseparable part of the structure of the church, and is accessible only through other parts of that structure; and, secondly, that by the arrangement for providing in this steeple bells to be "employed for the parish" the heritors were, in a lawful manner, fulfilling an obligation incumbent upon them by law to provide

at least one bell for the purposes of the parish church. Under these circumstances it appears to me impossible to doubt that when the agreement says the bells are "to be employed for the parish as well as the town," it means that they are to be used for such purposes as are properly and truly parish purposes, and properly and truly town purposes, and for no other purpose whatsoever; and that the regulation of the use of the bells for those purposes respectively was to belong, as to each kind of purpose, to the proper legal authority: *i.e.*, as to the parish purposes to the kirk session, and as to the town purposes, to the magistrates. And that as (on the one hand) the powers of the magistrates, as to town purposes, ought not to be usurped or encroached upon by the kirk session, so (on the other hand) the powers of the kirk session as to parish purposes ought not to be usurped or encroached upon by the magistrates.

This being so, I think it is reasonably plain that by assuming to regulate the hours of ringing these bells on Sundays for purposes of public worship, the magistrates have in two respects trespassed upon the proper province of the kirk session, and have violated the substance of the contract as to the employment of the "bells for the parish:" First, by fixing the particular hours at which the bells shall be rung for such purposes; whereas the right to fix those hours belongs properly to the kirk session: and, secondly, by doing this with a view to other worship than that of the parish church for which it would be wrong and unlawful, both on principle and according to the decision in the *Paisley Case* (1), to ring any bell or bells which had been lawfully provided by the heritors, in discharge of their legal obligation, for the purposes of the parish.

It further appears to me that there is no legal ground on the construction of this agreement for making any distinction (for these purposes) between one bell and another, so long as it is lawfully placed and remains in this steeple; and that there is no usage in this case by which the rights of the parties, according to the legal construction and effect of the original agreement of 1779, have been in any way restricted or altered.

While, however, I agree with the majority of the Judges in the

(1) 7 Feb. 1835; 13 S. 432; 7 Scot. Jur. 214, 4th Series, vol. i. p. 1145.

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Inner House on the merits of this case, I think it will be proper that the interlocutor should be varied, without prejudice to the costs of the appeal, in the manner proposed by the Lord Chancellor.

Ordered and adjudged that the interlocutor appealed from be varied by omitting the words as to "funerals or fires," and with this variation that it be affirmed with costs.

Agents for the Appellants: *Grahames & Wardlaw.*
Agents for the Respondents: *Connell & Hope.*

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HENDERSON *et al.* (STEAM-PACKET COMPANY) . . . . . } APPELLANTS;
STEVENSON . . . . . RESPONDENT.

Steam Packet Company's Responsibility for Loss of Luggage.

1 CPD. 295.
29.
1 QBD 515
521-2-8-9
531-2
1 CPD. 618-9
620-4-4 6-7-8
630-1-2
2 CPD. 418
421-9
5 CPD. 1, 3, 4, 5, 6
9 QBD 178
182-3-4
188-9.

A ticket, having on its face only the words "*Dublin* and *Whitehaven*," was given to a passenger, who, without looking at it, paid for it, and went on board. Having lost all his luggage he brought an action against the company. *Defence* of the company, that on the back of the ticket there was an intimation that they were not to be liable for losses of any kind or from any cause. Judgment against the company with costs.

Per THE LORD CHANCELLOR:—It would be extremely dangerous to hold that where a document is complete on the face of it, but having on the back of it something which has not been brought to the knowledge of a contracting party, he shall be held to have assented to that which he has not seen and of which he knows nothing.

Passenger's Assent.

Per LORD CHELMSFORD:—A mere notice from the steam packet company without the passenger's assent will not discharge them from performing the very essence of their duty, which is to carry safely and securely, unless prevented by unavoidable accidents.

Per LORD HATHERLEY:—A ticket is in reality nothing more than a receipt for the money which has been paid.

Per LORD O'HAGAN:—When a company desires to impose special and stringent terms upon its customers, there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted.

LIEUTENANT *STEVENSON*, of the 18th Royal Irish Regiment, purchased at the office of the owners of the *Countess of*

Eglinton steamer, a ticket for his passage from *Dublin* to *Whitehaven*, and went immediately on board. The ship was wrecked off the *Isle of Man* on the following day, entirely through the fault of those in charge. Lieutenant *Stevenson* got ashore, and found refuge in a peasant's hut, suffering great personal inconvenience, and losing his luggage, which was never recovered. On the 19th of June, 1872, he brought the present action against the above Appellants for payment of £71 and costs.

The defence was a remarkable one; the Appellants insisting that they were free from all liability for injury either to the Pursuer or to his luggage; their allegation being that they had entered into no contract with him; and that, at all events, they were saved from responsibility by an indorsement on the ticket which he had received, there being on the back of it a printed intimation in the following words:—"The company incurs no liability in respect of loss, injury, or delay to the passenger or to his luggage, whether arising from the act, neglect, or default of the company or their servants, or otherwise."

The Pursuer answered that the ticket on the face of it had only these words: "*Dublin* to *Whitehaven*;" and that he had never looked at the ticket nor seen the notice on the back of it, no one having directed his attention to either; so that there was no assent on his part to the alleged stipulation.

The Lord Ordinary (Lord *Gifford*) gave judgment in favour of the Pursuer; and on a reclaiming note the Second Division of the Court of Session adhered to this decision (1).

Against this judgment the Defenders in the Court of Session appealed to the House, having for their counsel Mr. *Milward*, Q.C., and Mr. *E. C. Clarkson*; who maintained that the stranding of the ship was an accident of the seas, for which the Appellants were not liable; and insisted that upon a true construction of the contract between the Appellants and the Respondent they were not liable for his losses.

The following cases were cited, namely: *Zunz* v. *South Eastern Railway Company* (2); *Carr* v. *Lancashire and Yorkshire Railway*

(1) Court of Session Cases, 4th Series, vol. i. p. 215.
(2) Law Rep. 4 Q. B. 545.

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Company (1); and *Stewart* v. *North Western Railway Company* (2).

But at the close of the Appellants' argument, the Law Peers, without calling on the Respondent's counsel, Mr. *Cotton,* Q.C., and Mr. *Thesiger,* Q.C., delivered the following opinions:—

THE LORD CHANCELLOR (3):—

My Lords, two questions have been argued on this appeal; the first being whether the contract between the parties had incorporated in it certain conditions printed on the back of the ticket; the other being a question which arises only upon the supposition that those conditions were so incorporated—whether they were in themselves legal conditions, and what was their proper construction? Upon the second question, my Lords, I do not propose to make any observations; but I will ask your Lordships to direct your attention to the first question, the answer to which appears to me of itself sufficient to dispose of this case.

The Respondent, an officer in Her Majesty's 18th Royal Irish Regiment, desiring to travel from *Dublin* to *Whitehaven,* took from the above Appellants a ticket for the voyage, going into their ticket office on the wharf, at the *North Wall* of *Dublin,* alongside of which the steamship the *Countess of Eglinton* was lying. He paid the fare for the voyage, and obtained the ticket in return.

On the face of this ticket there are letters indicating the name of the steam packet company, and the words "*Dublin* to *Whitehaven.*" This clearly, if the matter had so rested, would have been evidence of a contract on the part of the steam packet company to carry the person to whom the ticket was handed, in consideration of the money which he had paid to them, from *Dublin* to *Whitehaven,* and to use all reasonable care in the course of their undertaking so to carry him.

But, my Lords, on the back of the ticket there were printed these words:

This ticket is issued on the condition that the company incur no liability whatever in respect of loss, injury, or delay to the passenger, or to his (or her)

(1) 7 Ex. 707; 7 Railw. Cas. 426; 21 L. J. (Ex.) 261.

(2) 3 H. & C. 135.

(3) Lord *Cairns.*

luggage, whether arising from the act, neglect, or default of the company or their servants, or otherwise. It is also issued subject to all the conditions and arrangements published by the company.

There were also hung up in the office a time bill, and a list of fares; and also a general notice (1), which I need not further refer to, inasmuch as no evidence whatever was given that the Pursuer saw, read, or indeed had an opportunity of reading that general notice. But the question arises what was the effect of handing to the Pursuer a ticket having the words which I have mentioned upon the face of it, and having those further sentences which I have read upon the back of it.

With regard to the knowledge of the Respondent of what was printed upon the back of the ticket, your Lordships have his own evidence, which is not controverted, and upon which he does not appear to have been challenged or cross-examined, that in point of fact he did not read and did not know what was printed upon the back of the ticket. There was nothing upon the face of the ticket referring him to the back, and there was nothing said by the clerk who issued the ticket directing the Respondent's attention to what was printed upon the back. Your Lordships therefore may take it as a matter of fact that the Respondent was not aware of that which was printed upon the back of the ticket; consequently, so far as any intelligent knowledge of what was there printed is concerned, he cannot be taken intelligently to have agreed to the terms printed upon the back of the ticket.

I asked with some anxiety what was the authority for the proposition that a member of the public was to be supposed to have contracted under those circumstances in that way; and I have listened with great attention to all the authorities that have been cited. A great number of those authorities are cases where there was no question at all arising as to what the nature of the contract was. They were cases in which it was assumed either by the admission of both sides, or by the pleadings, that terms similar to those which I have read in the present case as printed on the back of the ticket formed part of the contract in those different cases.

(1) The general notice contained "an express condition that the passengers, and owners of the passengers' luggage, live stock, and goods, should undertake all risks whatsoever."

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Those cases therefore have no relation whatever to the present. There were a considerable number of other cases in which for the conveyance of animals or of goods, a ticket or paper had been issued actually signed by the owner of the animals or by the owner of the goods. With regard, again, to those cases there might indeed be a question what was the construction of the contract, or how far the contract was valid. But there could be no question whatever that the contract, such as it was, was assented to and was entered into by the person who received the ticket.

But what are the cases which are analogous in any way to the present? My Lords, of all that were cited there was really only one which could be said to approach the present case. That was a case tried in the Passage Court of *Liverpool* with regard to a ticket issued upon the occasion of an excursion train (1). And even with regard to that case, the observation is obvious that when it is examined it is not an authority at all to decide the present case. There a ticket had been issued to the excursionist which had upon the face of it "ticket as per bill." Therefore on that part of the ticket which the excursionist must have seen he was referred to some bill or other upon the subject of the ticket. It was in evidence further, by the admission of the excursionist himself, that he had seen and had read in the office a large bill on the subject of the arrangements with regard to the excursion; and that in that large bill he had seen a reference to some smaller bill or bills, but he had not referred to the smaller bills which were so mentioned. In that state of things, although the jury in the Passage Court found, and probably found rightly, that the excursionist was not aware of the contents of the smaller bills, the Court above (2) having leave to draw inferences of fact, came to the conclusion that, under the circumstances, the excursionist must be taken to have submitted himself to all the terms contained in the smaller bill, and to have been content to do that without reading in detail what those terms were.

I express, my Lords, no opinion upon that decision beyond saying that it does not in any way govern or cover the present case. The present case is a case in which there was no reference what-

(1) *Stewart* v. *North-Western Railway Company*, 3 H. & C. p. 135.

(2) The Court of Exchequer.

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ever upon the face of the ticket to anything other than that which was written upon the face. Upon that which was given to the passenger, and which he read, and of which he was aware, there was a contract complete and self contained without reference to anything *dehors*. Those who were satisfied to hand to the passenger such a contract complete upon the face of it, and to receive his money upon its being so handed to him, must be taken, as it seems to me, to have made that contract, and that contract only, with the passenger; and the passenger, on his part, receiving the ticket in that form, and without knowing of anything beyond, must be taken to have made a contract according to that which was expressed and shewn to him.

It seems to me that it would be extremely dangerous, not merely with regard to contracts of this description, but with regard to all contracts, if it were to be held that a document complete upon the face of it can be exhibited as between two contracting parties, and, without any knowledge of anything beside, from the mere circumstance that upon the back of that document there is something else printed which has not actually been brought to and has not come to the notice of one of the contracting parties, that contracting party is to be held to have assented to that which he has not seen, of which he knows nothing, and which is not in any way ostensibly connected with that which is printed or written upon the face of the contract presented to him. I am glad to find that there is no authority for such a proposition in any of the cases that have been cited; and I agree entirely with the observation of the Lord Ordinary (1) in the present case, where he says in his note:

> It has not been shewn that the Pursuer's attention was called either to the bills in the office or to the notice on the back of the ticket, or that he knew either of the one or of the other. There is no reason to doubt the Pursuer's word when he says he never read the conditions on the back of the ticket. Now it seems fixed that, in a case like this, mere notice not brought home to and assented to by the Pursuer is not enough (2).

My Lords, the question does not, as it seems to me, depend upon any technicality of law or upon any careful examination of decided authorities. It is a question simply of common sense.

(1) Lord *Gifford*. (2) 4th Series of Scotch Cases, vol. i. p. 216.

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Can it be held that when a person is entering into a contract containing terms which *de facto* he does not know, and as to which he has received no notice, that he ought to inform himself upon them? My Lords, it appears to me to be impossible that that can be held. The interlocutor of the Lord Ordinary, affirmed as it was in all respects by the Second Division of the Court of Session, appears to me to have been entirely correct; and I therefore move your Lordships that this appeal be dismissed with costs.

LORD CHELMSFORD:—

ICPD626 My Lords, the sole question is whether the Appellants are exonerated from all liability to the Respondent by reason of the notice on the back of the ticket delivered to him at the time of paying his passage-money. The Lord Ordinary (1) held that there was no proof that the Respondent assented to this notice, and therefore that the Appellants were responsible for the loss of his luggage, the vessel in which he was a passenger having been wrecked by the default of the Appellants' servants. The Lord Justice Clerk (1) and Lord *Benholme* (1) also thought there was no assent to the notice. Lord *Cowan* (1) and Lord *Neaves* (1) both thought that the terms and conditions indorsed upon the back of the ticket must be held to have been assented to and to have formed part of the contract between the parties. But the whole of the Judges of the Court below held that the loss sustained by the Respondent was not embraced by the words of the notice.

The steam packet company was established for the carriage and conveyance of passengers, passengers' luggage, live stock and goods. Their liability by law to a passenger is to carry and convey him with reasonable care and diligence, which implies the absence on the part of the company of carelessness or negligence. Of course any person may enter into an express contract with them to dispense with this obligation and to take the whole risk of the voyage on himself. And this contract may be established by a notice excluding liability for the want of care or for negligence, or even for the wilful misconduct of the company's servants, if assented to by the passenger. But by a mere notice, without such

(1) See the several opinions of the Scotch Judges, 4th Series of Scotch Cases, vol i. p. 218.

assent, they can have no right to discharge themselves from performing what is the very essence of their duty, which is to carry safely and securely, unless prevented by unavoidable accidents. I think that such an exclusion of liability for negligence cannot be established without very clear evidence of the notice having been brought to the knowledge of the passenger and of his having expressly assented to it. The mere delivery of a ticket with the conditions indorsed upon it is very far, in my opinion, from conclusively binding the passenger.

The Lord Chief Justice in the case of *Zunz* v. *South Eastern Railway Company* (1), which has been referred to, thought himself bound by the authorities to hold that when a man takes a ticket with conditions printed on it, he must be presumed to know the contents of it, and must be bound by them. I was extremely anxious to be referred to the authorities which influenced the judgment of the Lord Chief Justice; but although numerous authorities were cited by Mr. *Milward*, none of them go the length of establishing that a presumption of assent is sufficient. Assent is a question of evidence, and the assent must be given before the completion of the contract. The company undertake to convey passengers in their vessels for a certain sum. The moment the money for the passage is paid and accepted, their obligation to carry and convey arises. It does not require the exchange of a ticket for the passage-money, the ticket being only a voucher that the money has been paid. Or, if a ticket is necessary to bind the company, the moment it is delivered the contract is completed before the passenger has had an opportunity of reading the ticket, much less the indorsement. It may be a question whether, if a passenger were to read the indorsement and decline to agree to the terms, the company could refuse to take him as a passenger. Holding themselves out as undertaking to convey passengers by their vessels, it might be held that they are bound to carry upon the terms of their common law liability alone, unless a special contract be entered into with the passenger. But it is unnecessary to consider this point.

I have expressed a view of the case which places the right of the Respondent to an interlocutor in his favour on a different

(1) Law Rep. 4 Q. B. 544.

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ground from that which was assumed by the Court of Session; but I agree in the reasons which led them to their conclusion, because I think that a limitation of the legal liability of the steam packet company as carriers ought to be most strictly construed, as well as the assent to it distinctly proved. Therefore, my Lords, I agree with my noble and learned friend that the interlocutors ought to be affirmed, and the appeal dismissed with costs.

LORD HATHERLEY:—

My Lords, I entirely concur with my two noble and learned friends who have preceded me.

There are two questions and two questions only in this case. The first is, Has there been in fact any negligence on the part of the Defenders? That is a point upon which both the Lord Ordinary and the learned Judges of the Second Division of the Court of Session are perfectly clear, and as to which we should have great hesitation in differing from them if there was any doubt upon the subject; but as we can have none upon the evidence before us, it is not necessary for me to pursue the point. I assume, therefore, that the loss sustained by the Pursuer was entirely occasioned by the negligence of the Defenders.

The other point was as to whether the Pursuer had entered into a contract by which he agreed to be his own insurer, so to express it, not only against loss occurring in the course of the passage, but even against any neglect or default on the part of the servants or agents of the Appellants with whom he contracted. Now he entered into a contract as a passenger for the conveyance of himself and his luggage from *Dublin* to *Whitehaven*. In the absence of any restriction, assented to by him, to his right, he was entitled to consider himself as assured of that passage in safety, except so far, of course, as an obstacle might have arisen from any absolutely unavoidable accident. The carriers were obliged to use all due precaution and due care and diligence in carrying him and his luggage when once they had completed a contract as common carriers, for the purpose of so conveying him. They delivered to him a ticket, he having, in the first place, paid his money for the passage from *Dublin* to *Whitehaven*.

I agree with the observation that was made by my noble and

learned friend (1), that, the money having been paid, and the ticket having been taken up, a contract was completed upon the ordinary terms of conveyance for himself and his luggage, unless it can be made out that he had entered into any special contract to the contrary. A ticket is in reality in itself nothing more than a receipt for the money which has been paid. Of course, terms may be imposed by the carriers, and parties may agree to such terms in derogation of their right. Numerous authorities were cited by the counsel for the Appellants, but all those authorities I may say either shewed (which the majority of them did) an actual signature by the party, binding him somewhat stringently to certain conditions, or they consisted of cases in which the pleading had been that, whether there had been a signature or not there was an agreement; and that was admitted, and the cases turned and were decided upon that admission, which was, of course, as good as if a contract had been signed. Really, the only exception among the authorities was that noticed by my noble and learned friend the Lord Chancellor—the case in the Passage Court of *Liverpool* with regard to an excursion train; and I do not think it necessary to add any further observation upon that case.

In the present case the steam packet company having received the Pursuer's money, and having given him a receipt for it in the shape of a ticket which bore upon the face of it simply a heading with the initials of the title of the company and the words "*Dublin* to *Whitehaven*," what was the Respondents' position? He was entitled to consider that he had got a good and valid contract from common carriers to carry him upon the ordinary terms from *Dublin* to *Whitehaven*. That was his position, unless it can be shewn that he had in some way varied that position by a special contract. Now it happens in this case, fortunately, that there can be no doubt as to whether he did or did not read or inquire further into those conditions which were on the back of the ticket. He positively swears in one part of his examination to not having read the notice printed on the back of his ticket, and in his cross-examination he is in no wise shaken on that subject. But not only that, your Lordships have one of the

(1) Lord *Chelmsford*.

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Appellants themselves called on the other side, namely, Mr. *Robert Henderson*, and this question is put to him in his cross-examination: "Did you give any instructions as to directing passengers' attention to these conditions?" And he says, "Yes; a large notice embodying the conditions appears on the bills we issue each month." Then he is asked, "Did you give any instructions to the clerk who issued the tickets on your behalf to direct the attention of passengers to what was printed on the back?" And his answer is, "No." The clerk himself is called, and he says in his cross-examination, "I cannot say who bought the cabin ticket for *Whitehaven*. I was not in the way of drawing the attention of passengers to the condition on the back of the ticket or to the notice." That is clearly an admission of the fact that it was not this clerk's habit to call the attention of passengers to that which the Appellants seek to set up as part of the contract. It is an admission that, that condition being printed not on the face of the ticket, but on the back of it, he did not actually see to the passengers' attention being in any way called to it.

LORD O'HAGAN:—

My Lords, two questions have been raised in this case, and have been the subject of decision in the Court below; but, in the view which I take of it, the ruling of the first will dispense with any consideration of the second. The Respondent's loss, through the default of the Appellants, is plain, and now undisputed.

The Appellants rely upon a contract relieving them from liability; but the Respondent says that he never entered into such a contract: that the terms of it were never, in fact, made known to him; and that his assent to them was neither asked nor given. The question is one of evidence. Did the Respondent enter into such a contract? With the majority of the Judges in the Court below, and the noble and learned Lords who have preceded me, I am of opinion that he did not. And I have reached that conclusion substantially for the reasons which have been lucidly stated, and which it is not needful to repeat at any length.

Proof of the Respondent's knowledge and assent might have been given in various ways. In certain circumstances, denial of

them might not be permissible; in others, a jury or a Court might be satisfied of their existence from antecedent dealings, notoriety of custom, publication of notices, verbal communication, and so forth; but I agree with the Lord Chancellor that the mere receipt of a ticket, under such circumstances, and with such an indorsement as we have before us, is not shewn by the authorities cited at the Bar to furnish *per se* sufficient evidence of such assent or knowledge. We have positive and uncontradicted testimony that they did not exist: and in declining to discard that testimony on the strength of a false presumption, your Lordships will act in the spirit of the legislation which would have pronounced the contract we are asked to enforce void if the case had come within the statute. Of course, as it does not, we must deal with the facts as we find them: but it is satisfactory that we are enabled to decide in harmony with the policy of Parliament (1), which has relaxed the stringency of judicial decision in the interest of the public, and limited the power of companies to escape the proper consequences of their own misconduct or neglect.

We were asked by Mr. *Milward*, in the course of his able argument, what more could the Appellant have done to furnish notice of the terms on which they proposed to contract? One answer —and there might be many more—was supplied by some of the cases which he cited, and in which the signature of the passenger or consignor demonstrated conclusively his conscious and intelligent assent to the bargain by which it was sought to bind him. When a company desires to impose special and most stringent terms upon its customers, in exoneration of its own liability, there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted; and that the acceptance of them shall be unequivocally shewn by the signature of the contractor. So the Legislature have pronounced, as to cases of canals and railways, scarcely distinguishable in substance and principle from that before us; and if the effect of your Lordships' affirmation of the interlocutor of the Lord Ordinary be to compel some precaution of this kind, it will be

(1) *Railway and Canal Traffic Act* (17 & 18 Vict. c. 31), and *Carriers Act* (11 Geo. 4 & 1 Will. 4, c. 68).

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manifestly advantageous in promoting the harmonious action of the law, and in protecting the ignorant and the unwary.

On the second question raised, I make no observation. The appeal, in my opinion, should be dismissed, with costs.

Interlocutors appealed from affirmed; and appeal dismissed, with costs.

Agent for the Appellants: *Thomas Cooper.*
Agents for the Respondents: *Grahames & Wardlaw.*

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June 17.

COLONEL McDONALD. . . . . APPELLANT;
McDONALD AND TRUSTEES, *et al.* . . . RESPONDENTS (1).

Appointment with Directions and Conditions unsanctioned by the Power.

Per THE LORD CHANCELLOR (2):—Where a gift made under a power is accompanied by directions and conditions *ultra vires*, the gift will be valid and the directions void.

Per LORD SELBORNE:—Where there is an appointment authorized by the power, but with a superadded wish, desire, or condition, not authorized by the power, the appointment is valid; but the superadded wish, desire, or condition necessarily fails unless the appointee elects to give effect to it, which he may do without vitiating the appointment.

A mere purpose or direction unwarranted by the power, though it may have operated as a motive to the appointment, will not bind the appointee.

Personalty not within the Entail Statute.

A husband and wife, under a power in their ante-nuptial contract, appointed that £25,000 should be "settled and belong to their eldest son, and other members of their family in succession, being heirs in possession of their entailed estate":—

Held, that the eldest son and heir in possession of the entailed estate (3) was entitled to the £25,000 as absolute fiar, free not only from the fetters of the entail, but also free from any claim on the part of heirs coming after him, the money as personalty not being within the entail statute of 1685.

BY an ante-nuptial contract of marriage, dated the 8th of September, 1826, between the late Sir *John* and Lady *McDonald*, the

(1) See the case of *Colonel McDonald* v. *McDonald et al.*, decided by the House on the 12th of March, 1875, *supra*, p. 446.

(2) Lord *Cairns*.

(3) The above Colonel *McDonald*.

wife's fortune, about £50,000, was conveyed to trustees to pay the income to the spouses during their lives, and on the death of the survivor, to pay over the whole "to the child or children of the marriage in such proportions and under such conditions as the spouses should by joint deed appoint."

Two sons and three daughters were born of the marriage, during which the husband purchased two estates, adjoining his patrimonial property, borrowing £25,000 of the trust funds to pay the price, securing it over the property so purchased, and afterwards executed an entail of the whole.

On the 18th of July, 1837, "the spouses" by joint deed appointed that "the £25,000 should be settled on and belong to their eldest son, or, failing him, to the heir succeeding to the entailed estates."

Colonel *McDonald* (the above Appellant) was the eldest son of the marriage, and the heir in possession of the entailed estates. The contest in the present case was between him and the younger members of the family, the Colonel claiming the £25,000 absolutely.

The Lord Ordinary (1) held that the execution of the power by the joint deed of the 17th of July, 1837, was *ultra vires;* going in several respects beyond the authority of the power contained in the ante-nuptial contract, and therefore that the £50,000 should be divided among "the whole children of the marriage."

This decision was adhered to by the Second Division of the Court of Session, after a hearing before seven Judges; by a majority of whom it was held that "there had been no valid exercise of the power of appointment." Two of the Judges dissented, namely, the Lord Justice Clerk (2), and Lord *Ardmillan* (3).

Under these circumstances, Colonel *McDonald* appealed to the House, having for his counsel Mr. *Cotton*, Q.C., Mr. *Marten*, Q.C., and Mr. *J. M. Collyer*.

Mr *John Pearson*, Q.C., and Mr. *E. E. Kay*, Q.C., were heard for the Respondents.

(1) Lord *Gifford*.
(2) The Right Honourable Lord *Moncreiff*.
(3) Scotch Cases, 4th Series, vol. i. p. 794.

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The following elaborate opinions of the Law Peers disclose all the material facts of the case, and the grounds of the ultimate decision, with the recognised authorities.

THE LORD CHANCELLOR (1):—

My Lords, the only question of difficulty in this case is as to the proper construction of a joint deed of division executed by Sir *John* and Lady *McDonald*, in the year 1837.

The deed of trust—the ante-nuptial marriage contract—provided that the trust funds in question should not be divisible until the death of the survivor of the spouses; and when the joint deed of division came to be executed, although of course it was beyond the power of the spouses to give to Sir *John*, who was not an object of the power, anything beyond what the settlement had given him, and the settlement had given him only a limited interest of £750 a year for his life; still, the joint deed of division did nothing more than simply to declare that it was the will of the sponses that, in the event of Sir *John McDonald* surviving Lady *M'Donald*, he should have and enjoy "the life-rent use of her whole property during all the days of his life, just as she herself would have enjoyed it if she had survived him." Now, my Lords, there was not here any attempt to delay the distribution of the fund to a period longer than that assigned by the deed; for it was not to be distributed until the death of the survivor of the spouses. There was an attempt to give the whole of the income to Sir *John* during his life; but it was carefully guarded in this way: it was to be, as it necessarily must have been, only in the event of Sir *John McDonald* surviving Lady *McDonald*. In point of fact, he did not survive Lady *McDonald*. Under these circumstances, it appears to me it would be entirely contrary to reason, and, as far as I know, quite without authority, to hold that an attempted disposition, not in any way interfering with that which was legitimately within the object of the power, and only to take effect in an event which never has happened—should in any way militate against the validity of the subsequent disposition by the appointment.

I come next, my Lords, to what was done with regard to the

(1) Lord *Cairns*.

children of the marriage. Now, the facts which your Lordships will have to bear in mind with reference to that part of the case, are merely these: Lady *McDonald* had a very considerable personal property of her own. Shortly after the marriage, Sir *John* and Lady *McDonald* thought it would be desirable to purchase two estates neighbouring to that which belonged to Sir *John McDonald*, at *Dalchosnie*, namely, *Loch-Garry* and *Kinloch-Rannoch;* and Sir *John* purchased these properties for £28,000. To pay for them he borrowed £25,000 of the trust money which constituted the property of Lady *McDonald*, and he gave to her trustees a heritable bond over the properties so purchased. When the spouses came to consider the appointment they should jointly make of Lady *McDonald's* property, they took notice of the state of the landed property. A new entail was made of the *Dalchosnie* family property; and at the same time an entail was made of the *Loch-Garry* and *Kinloch-Rannoch* properties. They entailed the whole three upon their eldest son and their other sons in course of entail, and then upon other persons.

Now, my Lords, the spouses evidently intended and desired that the estates of *Loch-Garry* and *Kinloch-Rannoch*, which had been mainly acquired by the £25,000 of trust property, should go in the course of entail under which they were limited; and should go without the incumbrance of the heritable bond securing the £25,000. There is not the slightest doubt, at least not in my mind, that if Sir *John* and Lady *McDonald* had been asked: Do you desire to execute an instrument which shall say that *Loch-Garry* and *Kinloch-Rannoch* shall go in the course of entail under which they have been settled, discharged of the £25,000? they would have said: By all means; let that be done in whatever way it can be done.

But, my Lords, although there is no doubt that that was the general intention of Sir *John* and Lady *McDonald*, the question for your Lordships to consider is this: have they given effect to that general intention? It was perfectly well known that this general intention of the spouses could not be given effect to except through the medium of an appointment of the trust fund representing Lady *McDonald's* property; and the question again comes to be,

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have they in making that appointment, exceeded the conditions of the power?

By the joint deed they provided in these words:

It is our will that the said sum of £25,000 secured over the said estates of *Loch-Garry* and *Kinloch-Rannoch*, shall be settled on and belong to our eldest son and other members of our family in succession, being heirs in possession of the entailed estate.

That was the first part of the clause. The second was this:

The sum of £25,000 being the share of the property which we have allotted and apportioned, and do hereby allot and apportion as the share of our eldest son, or failing him, of the heir of entail succeeding to the said entailed estate.

The third part was this:

It being our desire and appointment that the said trustees under our marriage contract before narrated, or the survivors of them, should immediately on the death of the survivor of us renounce and discharge the said heritable bond, and disburden the said lands and estates of *Loch-Garry* and *Kinloch-Rannoch* of of the same.

Now, my Lords, as regards the first part of this clause, if it stood alone, it would, as it seems to me, be open to this observation: There is a direction to take £25,000 of the trust funds, and to settle it on the eldest son, to make it belong to the eldest son, a person then in existence, a person spoken of, a *persona designata*, by the title which then he filled. And if you add the words, "and other members of our family in succession being heirs in possession of the entailed estate," the most favourable view to the Respondents that could be taken of that clause would be that while the eldest son was to take in the first place, the other persons who were heirs in the course of the entail were to take afterwards in the same way in which they were to take the estates themselves afterwards; that is to say, the eldest son was to take that which was money in the way in which he was to take the land, as the heir of entail, or what we should term the tenant in tail, and he should take it therefore as the fiar, with a simple destination to those who afterwards might become fiars in succession. Your Lordships will readily see that if that were to be the construction, it would make the eldest son the absolute owner of the money, because of course the money could not be subject to fetters which would keep it from his absolute *dominium*.

But, my Lords, we have further information in the second clause, which is this:

> The sum of £25,000, being the share of the property which we, the said *John McDonald* and *Adriana McDonald*, have allotted and apportioned, and do hereby allot and apportion, as the share of our eldest son, or, failing him, of the heir of entail succeeding to the said entailed estate.

My Lords, I say if this clause stood alone, it would appear to me to be the clearest possible apportionment and appointment of the £25,000 as the share of the eldest son; and under the words, "or failing him," if he were not there at the time when the succession opened at the death of the survivor of the spouses, there would be an indication that the heir of entail succeeding to the entailed estate was to come in his place. There again, if that were to be the construction of the second clause, the eldest son being there, would be entitled as the object of the appointment, to take the money; and the circumstance that there was an alternative limitation which never came into operation to a person who might not have been an object of the power could not in any way defeat or invalidate the appointment to the eldest son, who truly was an object of the power.

My Lords, I have pointed out what appear to me to be the only two constructions which these two clauses admit of. There is either an appointment to the eldest son, with an appointment by way of succession to the next owners in tail, making both of them fiars, the one a fiar in the first instance with a simple destination to the others afterwards, or there is an appointment to the eldest son if he is alive at the death of the survivor of the spouses, with a conditional institution of the next heir of entail if the eldest son should not then be alive. In either case the eldest son would be entitled to the *dominium* of the money.

Then, my Lords, the third clause is this:

> It being our desire and appointment that the said trustees under our marriage contract, or the survivors of them, should immediately on the death of the survivor of us renounce and discharge the said heritable bond, and disburden the said lands and estates of *Loch-Garry* and *Kinloch-Rannoch* of the same.

That is the expression of what I began by saying was without doubt the general intention of the spouses, that by means of the land being disburdened of the heritable bond, it should be left to

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go in succession to the heirs of entail without the obligation of paying this sum of £25,000. It is simply an expression of a desire, which could only be carried into effect with the consent of the person who by the previous clauses was made, according to my opinion, the absolute owner of the £25,000. If he consented, the trustees might disburden the estate. If he did not consent, the estate had to remain burdened with this bond; and this expression of desire would not be held in any way, of itself, to take away from that ownership which was created by the former clause.

My Lords, it appears to me that the clause with regard to the portions for the younger children entirely corroborates this construction. That clause runs thus:

> It being provided that in case such funds shall exceed £10,000 to each younger child, the whole excess above £10,000 shall all fall to the eldest son, or heir of entail.

That is to say, to the eldest son if he is there, and if he is not there to the heir of entail, "with a view to its being laid out" (it says not by whom) "in the purchase of lands, and entailed with the other estates upon him, and the heirs called in the foresaid deed of entail through the whole course of succession." In other words, it shall fall to the eldest son, and it shall fall to him with a view to its being laid out in the manner described. Whether it would be so laid out or not would depend upon whether the heir, or the eldest son taking it, held himself to be bound by, or held himself willing to comply with, this expression of a wish as to the way in which the money should be used.

My Lords, that is the construction which, as it appears to me, ought to be put upon this deed; and, if so, the rule of law which is applicable to the subject is beyond all doubt. It was not in any way disputed at your Lordships' Bar. It is a rule to be derived from the authority of *Carver* v. *Bowles* (1), and the numerous class of cases of the same kind, and also from that class of cases (of which *Lascennes* v. *Tierney* (2) may be taken as an example) which, though not relating to powers but to gifts and legacies, raise questions almost identical with those which are raised in the cases of which *Carver* v. *Bowles* (1) is an example. From all those

(1) 2 Russ. & My. 301. (2) 1 Mac. & G. 551.

cases the plain rule is derivable that, if you cannot disconnect that which is imposed by way of condition, or mode of enjoyment, from a gift, the gift itself may be found to be involved in conditions so much beyond the power that it becomes void. But where that is not so, where you have a gift to an object of the power, and where you have nothing alleged to invalidate that gift, but conditions which are attempted to be imposed as to the mode in which that object of the power is to enjoy what is given to him, there the gift may be valid, and take effect without reference to those conditions.

My Lords, here, it appears to me, that there is a clear gift in the events which have happened to the eldest son. There is nothing whatever attempted to be added by way of checking his enjoyment of the property but the injunction to the trustees (that is, to other parties) to destroy the security by means of which the money appointed to the eldest son was secured. The trustees, of course, could not do that without the consent of the person to whom the money was given. It appears to me that there is no authority whatever which would warrant your Lordships in holding that a direction of that kind could invalidate an absolute gift.

My Lords, that being so, the deed of division appears to me to be entirely efficacious for the purpose of vesting in the eldest son the right to receive the £25,000, and I shall, therefore, take leave to submit to your Lordships the motion that the interlocutors which are appealed from should be reversed, with a declaration that the Appellant is entitled, as from the death of Lady *McDonald*, to the £25,000 secured over the estates of *Loch-Garry* and *Kinloch-Rannoch*, and that with this declaration the case should be remitted to the Court of Session.

LORD HATHERLEY:—

The real difficulty of the case has been, what is to be done with reference to the £25,000? The spouses say it is their will that it shall be "settled on and belong to our eldest son and other members of our family in succession, being heirs in possession of the entailed estate." That would have been their desire if they could have effected it as regards this sum of personalty—at least, what we should call personalty—this sum of £25,000. But if they had

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settled it upon the eldest son, and settled it with the same limitations as were expressed with reference to the landed property, the result would have been that it would have gone to him absolutely. And if they had stopped there, he, being alive at the death of the survivor of the two spouses, would have taken the sum absolutely, and would have had it free from any possible claim on the part of those who might come after him, inasmuch as it was not subject to the fetters and limitations imposed by the Act of 1685.

But the spouses do not stop there. The words of the deed make it still more plain as they proceed, "the sum of £25,000 being "—what?—"the share of my" (the wife's) "property, which we" (the spouses) "have allotted and apportioned, and do hereby allot and apportion, as the share of our eldest son." I cannot conceive any words of appointment more clear than those—I cannot conceive any words (to follow Lord *Cottenham's* dictum in *Lascennes* v. *Tierney* (1)), that would more completely, and clearly, and neatly, sever one share from the rest of the fund; whether that fund be a testator's general estate, as in the case of a will, or, as in this case, a fund of which an appointment is made existing in the hands of trustees in one large mass. Out of the fund in the present case the sum of £25,000 is plainly severed.

That distinguishes this case, and the case of *Lascennes* v. *Tierney* (1), from a case like one which was referred to before myself—namely, *Rucker* v. *Scholefield* (2), and from all the cases in which you find the gift only in a continued series of limitations expressed in the instrument, without any complete severance of the share at once, and in which you find a subsequent dealing with that share and interests allotted and apportioned in it to the parties intended to be benefited; and in those cases, if those parties be out of the range of the power, the appointment becomes vitiated, because you cannot separate it from a continued series of limitations. But here we have a share taken out of the general trust fund, and allotted to the eldest son, or, failing him, to the heirs in possession of the entailed estate. He did not fail at the death of the survivor of the spouses. Then he was found, and then was his share found for him; it was allotted and apportioned for him; it was taken out of the estate. The case, therefore, appears

(1) 1 Mac. & G. 551. (2) 1 H. & M. 36.

to fall as clearly within the case of *Carver* v. *Bowles* (1) as any case that can be conceived.

No doubt the spouses proceed to say that they wish the trustees to "renounce and discharge the said heritable bond, and disburden the said lands and estates of *Loch-Garry* and *Kinloch-Rannoch* of the same." That is a condition superadded to the clear and plain allotment of the share which had been made to the eldest son; and, being a condition by which he is not fettered or bound, the condition itself becomes simply a void condition as against him, and he takes the property as he would have taken it under the former limitation, if it had been a limitation to him by way of settlement, in the same manner as the estates were settled, it not being subject to fetters for the reasons I have already assigned.

There was, undoubtedly, also a desire of the spouses that a full and complete disposition should be made of the funds over which they had the power of appointing. In the exercise of that power I think they have made a sufficient disposition in the events which have happened to the eldest son. And I think the subsequent direction in which they attempt to impose a condition upon the trustees—a condition which the trustees could not with any propriety have fulfilled—to release the estate from the bond, fails to take effect. This is in accordance with the authority of cases which have been decided over and over again in the English Courts, the principle of which is coincident with that which is supported by the learned Judges in the Court below, although they have differed in their argument as to the conditions. I think, therefore, my Lords, that the conclusion which ought to be come to is that the appointment took effect *simpliciter*.

LORD SELBORNE:—

My Lords, I read this deed exactly as if the words had stood thus: "We do hereby allot and apportion the sum of £25,000, secured over the estates of *Loch-Garry* and *Kinloch-Rannoch*, as the share of our eldest son; or, failing him, of the heir of entail succeeding to the said entailed estates; and it is our will and desire that the said £25,000 shall be settled on, and belong to, our eldest son, and other members of our family in succession, being

(1) 2 Russ. & My. 301.

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heirs in possession of the said entailed estates; and also that the trustees under our marriage contract, or the survivors of them, shall, immediately on the death of the survivor of us, renounce and discharge the heritable bond for the same sum of £25,000, and disburden the said lands and estates of *Loch-Garry* and *Kinloch-Rannoch* of the same."

So reading the deed, there is first an appointment (in the events which have happened) to the eldest son, as fiar, of the whole £25,000. All that follows is but a superadded wish, desire, or condition, having in view the settlement or the release to the owners of the entailed estates, of the sum so appointed; which ulterior purpose might be accomplished, and could only be accomplished, through the medium of the estate and interest vested in the eldest son by virtue of this appointment. That wish, desire, or condition, not being authorized by the power, must necessarily fail, unless the appointee (whether bound to elect or not, by reason of other benefits given to him independently of the power) should elect to give effect thereto; but the appointment itself is not, therefore, vitiated. The authorities, of which *Carver* v. *Bowles* (1) is an example, have determined (on principles which, if sound in *England*, must be equally so in *Scotland*) that an ulterior purpose of this kind, which is *ultra vires* only, and not also a fraud on the power, though it may have operated as a motive to the appointment in the mind of the appointor, will, nevertheless, not prevent an object of the power from taking for his own benefit the estate appointed to him, if the words used, according to their proper construction (which must itself be independent of any peculiar doctrines of law applicable to powers), are sufficient to execute the power, and to vest the property in the appointee.

The context of this deed satisfies me, not only that, on sound principles of construction, this was its real effect, but that the appointors intended to do the very thing which, in law, they did; and that they well understood that it was necessary that the deed should so operate in order to make it possible that their ulterior wishes should be capable of accomplishment. The declaration and appointment which they made was expressed to be "in consideration of the said deed of entail" (*i.e.*, the entail of the

(1) 2 Russ. & My. 301.

Loch-Garry and *Kinloch-Rannoch* estates), as well as "of the powers possessed by us under the said contract of marriage;" and, after disposing of the £25,000 in the way which has raised this controversy, they proceeded to appoint the rest of Lady *McDonald's* settled property equally among their "younger children, exclusive of the heir," to the extent of £10,000 each; directing that if there were any excess above that amount, such excess should all fall to "the eldest son or heir of entail as above mentioned." Here, also, they superadded the expression of an ulterior wish, to be effectuated through that appointment, by the words which follow: "with a view to its being laid out in the purchase of lands, and entailed, with the other estates, upon him, and the heirs called in the aforesaid deed of entail, through the whole course of succession." And afterwards, in two places, they referred to the £25,000 as being by this deed "settled on the heir of entail"—words which are clearly in those places applicable to the eldest son, as well as to any other heir of entail who (in different events from those which happened) might have succeeded on the deaths of the appointors to the entailed estates. A comparison of all the passages in which the appointee of the £25,000 is thus spoken of in the singular number seems to me to make it quite clear that one individual person (to be ascertained with reference to the state of the title to and possession of the entailed estate immediately after the death of the survivor of the appointors), and one person only, was intended to take the £25,000 by way of appointment.

That being so, I agree with your Lordships, that the opinion of the minority of the learned Judges in the Court of Session was correct, and that this appeal ought to be allowed.

Interlocutors reversed, and cause remitted, with a declaration "that the Appellant is entitled, as from the death of Lady McDonald, to the £25,000 *secured over the estates of Loch-Garry and Kinloch-Rannoch," and with direction to proceed accordingly.*

Agents for the Appellants: *Loch & Maclaurin.*
Agents for the Respondents: *Grahames & Wardlaw.*

1875
June 7.

F. N. STEUART, Executor of the late SIR W. D. STEUART, Bart. . . . . } Appellant;

MRS. ROBERTSON AND HER HUSBAND Respondents.

Interchange of matrimonial Words—Kissing and "Bedding."

6 Jeff Cas 498

After a family supper, one of the party—a bachelor—put a ring on the finger of one of the daughters, a spinster, and said to her, "Maggie, you are my wife before heaven—so help me, oh God!" The two thereupon kissed each other, and Maggie said, "Oh, Major!" Their health was drunk, and they were forthwith "bedded," according to an obsolete Scotch fashion:—

Held by the House of Lords, reversing the judgment of the Court of Session, that no marriage was contracted; it appearing clearly that no real marriage was then intended by either of the parties, although the ultimate maturing of matrimony and legitimation, under the Scotch law, of any issue that might be procreated in the interval, was hoped for and confidently anticipated by "Maggie" and her relatives.

Per The Lord Chancellor (1):—The burden which lay on the Pursuer to establish her marriage has not been discharged. On the contrary, there has been presented a body of evidence, derived from documents written, acts done, and declarations made, all bearing with a strength irresistible against the marriage.

Per Lord Selborne:—The Report of the Royal Commission states that "the most express declaration, oral or in writing, by both parties, that they are husband and wife, will not make them so, unless the Judge is satisfied that the inward intention of their minds was in accordance with those outward words or acts." I am sorry to say that in *Scotland* persons generally reputed to be respectable, though not fastidious, may sometimes reconcile their moral sense to the notion of an inchoate marriage, to be perfected by the progress of events,—of which they expect a favourable issue.

In 1865 Major *William George Drummond Steuart*, the heir of a baronetcy and of a large estate in *Scotland*, when nearly forty, made the acquaintance and became familiar with *Margaret Wilson*, then sixteen, the daughter of a fishing tackle maker in *Edinburgh*; in whose house a supper was given on the 13th of February, 1866; the party consisting of the Major, the father and mother of *Margaret Wilson*, her elder brother, and her friend, a Mrs. *Kellet*. After the supper the father said to the Major, "I am getting a bad name with your staying so long in my house among my three daughters." The Major answered, "I will shew you what I can

(1) Lord *Cairns*.

do to shut up people's mouths. I am poor now, and cannot marry; but I will marry her in the Scotch fashion;" whereupon the Major went down on one knee, took a wedding ring from his pocket, put it on *Margaret's* finger, and said, "*Maggie*, you are my wife before heaven; so help me, oh God." They then kissed each other; and *Margaret* said, "Oh Major." The health of the couple was drunk, and the entertainment was closed by the Major and *Margaret* being "bedded," according to an obsolete Scotch fashion.

The question was, whether the affair here described constituted a real marriage by the law of *Scotland*, or was only got up to sooth the father, and to "shut up people's mouths."

The Major and *Margaret Wilson* lived together for some weeks after the supper festivity, and at several periods subsequently; but there was no continuous matrimonial cohabitation; nor did they represent each other to third parties as husband and wife—the Major invariably repudiating the marriage, till on his deathbed he appeared, but somewhat doubtfully, to admit it, being then in a fit of delirium tremens.

On the 2nd of April, 1867, a son was born of the connection. The mother had it registered as *illegitimate*. The Major died on the 19th of October, 1868. She thereupon claimed alimony for the boy as a bastard, and she signed the receipts for the allowances not as a widow but as a spinster.

On the 12th of March, 1871, she, as a spinster, married Lieutenant *Robertson*.

On the 14th of March, 1872, her child died.

On the 27th of April, 1872, she commenced, with her husband's concurrence, the suit in the present case, praying a judicial declaration that she had been the lawful wife of the deceased Major *Steuart*, and that their child, whom she had previously described as a bastard, was "their lawful son."

The First Division of the Court of Session obtained opinions from the Judges of the Second Division, and on the 27th of February, 1874, pronounced a declaration in conformity with the prayer of the summons; in other words, they, by a majority of nine judges against four, decided that the supper ceremonial, combined with the "bedding," constituted a valid marriage between

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Margaret Wilson and the deceased Major *Steuart;* and that the child was "his lawful son" (1).

Against this judgment the executor of the Major's father appealed to the House of Lords, having for his counsel, Mr. *Southgate,* Q.C., and Mr. *Balfour* (of the Scotch Bar).

Mr. *Karslake,* Q.C., Mr. *Scott,* Mr. *Brand,* and Mr. *Macrae Moir,* appeared for the Respondents.

After a very long and elaborate argument by the learned counsel on both sides, the following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (2):—

My Lords, in the litigation in *Scotland* out of which this appeal arises the majority of the learned Judges have determined that a marriage, valid according to the Scotch law, was proved by the female Respondent *Margaret Wilson,* now *Robertson,* to have taken place between herself and the late Major *Steuart.*

The late Major *Steuart,* eldest son of Sir *William Drummond Steuart,* of *Grandtully* and *Murthly,* baronet, now deceased, was the heir in tail of landed estates of considerable value. The question of the marriage might and would have involved the title to succeed to these estates had a son of Major *Steuart* by the Respondent lived. That son died an infant; and the present litigation, although deeply important as regards the status of the parties, and the view which it presents of the law of marriage, involves a moderate amount of personal property only. The contest as to this is between the Respondents and the Appellant, as the general disponee and executor of Sir *William Steuart.* The Appellant disputes the fact of marriage.

The marriage sought to be established is what is termed an irregular one. It is not founded on habit and repute, or on a promise *subsequente copulâ.* It is said to have been made *per verba de præsenti,* and the words constituting the marriage are said to have been uttered in a few sentences after a supper on the 13th of February, 1866, six years before the institution of the present

(1) Court of Sess. Cas. 4th Series, vol. i. p. 532.

(2) Lord *Cairns.*

proceedings. There is no written evidence which supports the marriage, but in the parol evidence of what is alleged to have taken place on the 13th of February, 1866, and in the parol evidence adduced either to corroborate or to throw discredit on what is alleged to have taken place on that night, 300 pages or more of the print are occupied; and in the hearing of the case in the Courts of *Scotland* your Lordships were informed that upwards of twenty days of judicial time had been consumed. The argument at your Lordships' bar, which was not longer than the materials required, extended over at least a fourth of that time.

At the date of the alleged marriage the female Respondent (whom I will term the Pursuer) was about sixteen or seventeen years of age. She was the daughter of *George Wilson*, a fishing-tackle maker, who had a shop in *Waterloo Place, Edinburgh.* Major *Steuart* appears to have been at the same time between thirty and forty. He had served as an officer in the 93rd Highlanders throughout the Crimean War, and in the Indian Mutiny, and had received the Victoria Cross as a reward for his bravery. After returning to *Scotland,* however, he appears to have led a dissolute and dissipated life. Two women are mentioned in the proof, besides the Pursuer, with whom he had cohabited, and by each of whom he had an illegitimate child. His habits of drunkenness were such, that several witnesses state they seldom saw him sober, and he gave way to this vice in low company, and in a manner attracting attention and outraging decency in public places. By these habits, which appear to have been confirmed before, and to have continued after the alleged marriage, he undermined his constitution, became subject to fits of *delirium tremens,* and died on the 18th of October, 1868, after passing out of an attack of *delirium tremens,* and apparently in consequence of an injury inflicted on himself during its continuance. I will subsequently examine the relations which appear to have subsisted between Major *Steuart* and the Pursuer prior to the 13th of February, 1866; but in the first place I will direct your Lordships' attention to the evidence of what took place on that night. I will merely premise that it is not averred or proved that before the alleged ceremony of that night any promise or engagement of marriage existed between the parties.

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The words constituting the marriage are said to have been spoken in the presence of Mr. and Mrs. *Wilson*, both of whom are dead, and of *George Wilson*, their son, and Mrs. *Kellet*. And it is stated that Major *Steuart* and the Pursuer cohabited from that time forward, and had not had any sexual intercourse previously. I will refer, first, to the evidence of *George Wilson*. He is an elder brother of the Pursuer. He was himself married at the time, and living in a house or lodgings of his own. On the evening in question he was at the residence of old *Wilson*, his father, which was a flat in *Clyde Street, Edinburgh*. There were living there at the time the father and mother of the Pursuer, two younger sisters, *Georgina* and *Mary*, aged respectively fifteen and fourteen, and a brother *Alfred*, still younger, a servant named *Agnes Forbes*, and Major *Steuart*, who was lodging in the house under circumstances which I shall afterwards mention. The supper began about nine o'clock, and finished about ten. *George Wilson* states that there were plenty of eatables and drinkables, and among the latter champagne; that after supper old *Wilson* sent the three younger children to bed, Mrs. *Kellet* going out of the room with them; that after the children left the room old *Wilson* told the Major he would have to leave his house, because he had been too long in it, and it would not do to stay longer as the people were making complaints, and his daughters were not to have their names ruined by him staying in the house; that the Major sat quiet for a minute or two, and tears came into his eyes; that he then said: "*Wilson*, I will shew you what I can do; I am poor now, and cannot marry; but I will marry her in the Scotch fashion," or words to that effect; that he then went down on one knee, put his hand into his waistcoat pocket, and took out a wedding ring, which he placed on the third finger of her left hand, and said: "*Maggie*, you are my wife before heaven, so help me, oh, God!" that the two kissed one another; she said, "Oh, Major!" and put her arms round his neck. He said he wished this to be kept private; that when he got his money he would make it public; he would buy a house out at the *Grange* till his father died. Everybody then shook hands and drank their health; that he left the party still in the dining-room when he left the house. The same witness, on cross-examination, says he supposes his

father first thought there was to be a marriage that night when the Major got up and said, "*Wilson*, I will shew you what I can do."

Mrs. *Hannah Kellet* appears to have been a friend of the *Wilsons* and a confidential companion of the Pursuer. She had been married to her present husband just before the day in question. She had been in the habit of going to balls with Mrs. *Wilson*, and, being employed at a hairdresser's shop, she came on the evening in question to dress the Pursuer's hair, and remained for supper. She had gone out of the room to put the younger children to bed, and after a short time she says she was called in, she thinks by Mrs. *Wilson*. When she went in, the Major, she says, was saying that he could not do what he would wish to do at the present time; but he said, "I will shew you, *Wilson*, what I will do," or "can do." Then he filled up the wine-glasses, went in front of the wardrobe beside the Pursuer, went down on his knee, and took a ring out of his pocket, put it on the third finger of her left hand, and said, "*Maggie*, you are my wife before Heaven, so help me, great God," or words to that effect. They then kissed each other. The Major said he wished what they had seen that night to be kept secret until such time as he would be in a position to make it public. Mrs. *Wilson* gave them a blessing, and said she hoped the Major would be kind to *Maggie*, and she hoped God would bless them. Perhaps these were not her exact words, but they were her meaning. She continues: "I remember the bedding taking place. I assisted at it. I threw a pillow at them. Mrs. *Wilson* threw one first, and then I threw one. I hit the Major on the head with it. After seeing them bedded we all left." On cross-examination, being asked, "How long did the ceremony last?" she replied, "So long as the Major spoke, and he spoke a good bittie. I have stated all he said, as far as I can remember."

This is the whole of the direct testimony as to the words by which the marriage is said to have been constituted; and I will assume that there is no doubt that if the words were used, in fact, seriously, and with the intention of constituting a marriage, they were sufficient for the purpose. The question is, were the words used at all, and were they used in this way and with this intention? This

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is a question of fact, involving for its determination the credibility, the accuracy, the intelligence of the witnesses. No direct evidence can be adduced to contradict them, for no other living persons were present. They are, the one the near relative, the other the friend and intimate companion of the Pursuer, and both of them deeply interested, for their own character and that of the Pursuer, in maintaining the Pursuer's case. They furnish us with one or two sentences spoken at a sitting which continued for an hour or two, and even as to these sentences they only profess to give their effect, and not the precise words. It is necessary, therefore, to try the evidence of these witnesses rigidly by all the tests to which it can legitimately be subjected. They speak of several other facts and occurrences, as to which their evidence can be contrasted with undoubted testimony, and it will be necessary so to contrast it. Your Lordships have spread before you the life of Major *Steuart* and of the Pursuer, their sayings, writings, and doings from the date of the alleged marriage onward, and the sayings, writings, and doings of those present at the alleged ceremony of marriage, and it will be for your Lordships to consider whether these sayings, writings, and doings can be reconciled with the hypothesis of a marriage having taken, or having been been supposed to have taken place.

My Lords, it is unnecessary to consider minutely whether all that appears to have been said by Major *Steuart* subsequent to the alleged marriage can be admitted in evidence irrespective of the question whether the Pursuer was or was not present. It is evident from what fell from members of this House in the case of *Jolly* v. *McGregor* (1), that a very wide range of evidence under this head is open; but in the present case no objection has been taken to any of the evidence to which I have to refer, and your Lordships were told at the bar that it was not desired to exclude any part of that evidence.

I will, therefore, address myself to the history of the case subsequent to the alleged marriage. Major *Steuart* continued to live in the *Wilsons'* house until the 24th of February, 1866, when he went to reside in *St. Patrick's Square* to conceal himself from his creditors. The Pursuer remained at her father's house, although

(1) 3 Wil. & Shaw, 179.

there was no reason, on the score of secrecy, that she should not have cohabited with Major *Steuart*, if she were his wife, inasmuch as it is stated that she went to see him daily.

It is during this time that the first letter of Major *Steuart* which we have in evidence, that of the 11th of May, 1866, was written. It is written to old *Wilson*, whom the witnesses of the Pursuer say the Major was accustomed, after the marriage, to call "father" or "old boy." It is addressed "My dear sir," and signed "Yours truly," and contains no trace of familiarity.

While Major *Steuart* was in *St. Patrick's Square* he had some communications with Mr. *Rigg* which appear to me to be of considerable importance. Mr. *Rigg* is a priest of the Roman Catholic Church, to which church Major *Steuart* belonged. He was an old friend of himself and of his father, and he was in the habit of seeing Major *Steuart* frequently in *Edinburgh*. He says:

He called upon me pretty frequently, and on many occasions I saw him on the street intoxicated. My house is not far from *Clyde Street*. He was generally in an excited state when he came to my house, and I thought more frequently under the influence of liquor than not. I have seen him not under the influence of liquor, but I rather think that was the exception.

I remember him going to *St. Patrick Square* to live. I think his object was to be out of the way of creditors. I visited him there several times, and my recollection is that he was not under the influence of drink—at least not in any degree that could be observed. *Q.* Not to the extent you had seen it previously?—*A.* No, certainly not. *Q.* On that occasion had you somewhat serious conversations with him on the subject of his connection with this woman?—*A.* I had. *Q.* What occurred?—*A.* I stated that in my former evidence; I told him that there was every probability that a marriage would be proved against him—that he would so commit himself that a Scotch marriage would be proved against him from the way in which he was acting with the girl. He told me that he was quite upon his guard—that the family had made many attempts to get something written from him, but that he was always upon his guard never to give them anything whatever—anything written whatever. He said he had been particularly upon his guard, and that he knew well how easy it was for a man to get entrapped in that way. *Q.* Did you say to him that it was merely by writing that a Scotch marriage might be proved against him?—*A.* No. *Q.* Did you understand that he was referring merely to writing?—*A.* Certainly not; he said he would be on his guard not only in regard of writing, but in regard of anything else that could constitute a Scotch marriage. *Q.* Did he say they would endeavour to entrap him?—*A.* He said that they had done so—that they had tried to obtain some writing from him. *Q.* Did he also use the expression that the family had tried to entrap him into marriage?—*A.* I cannot say that he said they had endeavoured to do so by anything else than writing, but he certainly said that they had endeavoured to procure something written from him. *Q.* So

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far as you recollect, did he use the words entrap him into a marriage?—*A.* Yes.

From the 12th of May to the 3rd of July, 1866, Major *Steuart* was a prisoner for debt in the *Calton* gaol. During that time he was of course kept in a state of sobriety. Dr. *Simson*, the physician attending at the gaol, gives the following evidence:

I was in the habit of seeing him frequently, but one day I went and expressed my regret at seeing a person of his position there, and I said that if he would give up drinking and have nothing to do with Miss *Wilson*, I was authorized to pay all his debts. He asked me how that was, and I said he had no business to know anything about it, but that I would undertake to have them paid, and that he might take my guarantee for it. I shewed him what a respectable man he might be if he gave up his dissipated habits, and his connection with Miss *Wilson*. After reasoning the matter he admitted the whole of it. *Q.* What did he say?—*A.* He said that certainly drink was a very bad thing, but that I was not aware of the pleasure now and then of getting drunk; and as to his connection with Miss *Wilson*, I said that a man who drank as he did and got involved as he did, would be sure to be taken in for a marriage. He said, "Ah, they have tried that often before, but they have never succeeded." I said, "But they may succeed." He said, "Ah! I will take care of that." *Q.* Who did he refer to as having tried?—*A.* I said the relations would do it, and he said, "Oh, they have tried that again and again." *Q.* Did you use the word "relations"?—*A.* I have no doubt I used the word "relations"; he did not use the word "relations," but he said, "they" have tried. *Q.* Whose relations did you refer to?—*A.* Miss *Wilson's* relations, of course. After he got out of prison I have frequently seen him going about in the streets. He was very different on the street from what he was in prison; he was very often shabbily dressed, and also under the influence of drink. *Q.* Was it quite obvious that he was under the influence of drink?—*A.* He was sometimes very bad. *Q.* Was he so bad as to attract the notice of the public?—*A.* I was walking one day with a lady when he came up to me, and after he went away she said "What blackguard is that you were speaking to?" He was very bad that day, both in dress and appearance. *Q.* Have you seen him very frequently under the influence of liquor?—*A.* I would not say very frequently, but frequently. *Q.* During the day?—*A.* Yes.

After leaving *Calton* gaol on the 3rd of July, 1866, Major *Steuart* would appear to have returned to the house of the *Wilsons* in *Clyde Street*. About the middle of September, 1866, Major *Steuart* and old *Wilson* went to *Birnam*, close to the residence of Sir *William Steuart*, for the purpose of fishing. On the 25th of September Mr. *Wilson* sent a telegram to his wife to send some fishing materials; and the next day the Pursuer, uninvited, brought them to *Birnam*. Major *Steuart* and old *Wilson* were lodging in *Birnam*, at the house of Mrs. *Hutton*. Major *Steuart* introduced the Pursuer to Mrs. *Hutton* as Miss

Wilson in the presence of her father. I do not go through the details of the twenty-four hours during which the Pursuer remained at *Birnam*, of their ejection from Mrs. *Hutton's* house, of their irruption in the middle of the night into the residence of Sir *William Steuart*, and of the Pursuer's departure the next day by railway to *Edinburgh*. The evidence as to this part of the case leaves no doubt on my mind that neither the Pursuer nor Major *Steuart* supposed or represented that they were husband and wife.

It is at this point of the narrative that the episode as to the portmanteau, founded on in the condescendence, and to which some of the Judges have attached more or less weight, comes in. The true version of what occurred as to this portmanteau might have remained in some doubt on the parol evidence; but fortunately the letter of Major *Steuart* to Mrs. *Wilson*, the date of which is fixed by the internal evidence to be about the 1st of October, 1866, puts the matter beyond controversy; and shews that the story told in the condescendence, and attempted to be supported by some of the evidence of the Pursuer, is absolutely without foundation. But I cannot look upon this episode as if it had never been introduced. It was made a part of the Pursuer's case, and it is impossible that she can have believed in its truth. It appears to me to have been a reckless attempt to provide facts which might be fitted on to some silly gossip about missing or abstracted documents which had prevailed at *Birnam*, and the attempt having failed cannot but suggest a distrust of the manner in which the Pursuer's case has been put forward.

The Pursuer returned, as I said, to *Edinburgh*, and Major *Steuart* continued to reside at *Birnam* until the beginning of the year 1867. During this time no letters from him to the Pursuer are produced, but there are several letters from him to Mrs. *Wilson*, the mother. In none of them does he address her otherwise than as Mrs. *Wilson*, nor in any of them is there any trace whatever of any connection by marriage with her daughter.

During the residence of Major *Steuart* at *Birnam* a remarkable incident in the history of the Pursuer occurred. *Alexander Laing* and his wife, neighbours of the *Wilsons*, were proceeded against in the Police Court of *Edinburgh* by the Pursuer, styling herself *Margaret Wilson*, on the ground that they had behaved to

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her in a disorderly manner and used opprobrious epithets. The evidence of the Pursuer states that the epithets used were words suggesting that the Pursuer was the kept mistress of Major *Steuart*. This complaint was met by a cross-complaint from Mrs. *Laing* against *Jane Wilson* (who is stated to have been a sister of the Pursuer), for throwing earth upon her out of one of the windows, and committing a breach of the public peace. These two complaints are heard on the same day. *Jane Wilson* was fined £1 sterling, and the complaint against Mrs. *Laing* was dismissed. What, however, is important is, that the witness *Torry*, states that while defending the case for Mrs. *Laing*, the Pursuer, on her oath, admitted that she cohabited with Major *Steuart* in the house, and being asked whether she was married to him, she said she was not. The witness, *Alexander*, indeed, states that when *Torry* put this question the Pursuer replied she was lawfully married or legally married to Major *Steuart*, and *Agnes Forbes*, the *Wilsons'* servant, says that she was in Court and heard her say she was legally married to Major *Steuart*. *Agnes Forbes*, however, says she was not in Court when the Pursuer's case came on, and that it was in *Jane's* case she heard the Pursuer say she was legally married, and that her statement that she was legally married to Major *Steuart* was not made in answer to any question put to her by any one in the case, but in reply to a remark which was made by a man there. Mr. and Mrs. *Laing*, on the other hand, state distinctly the details of the examination, and corroborate *Torry's* evidence, and so does the witness *Hunter*; and it is indeed obvious that that evidence must be correct, for if the Pursuer had stated that she was legally married to Major *Steuart*, she would at once have been met by her own complaint, which was taken out in her name as a spinster.

I cannot but attach great importance to this incident. It was an occasion on which the Pursuer would at once have established her case and cleared her character by shewing that she was Major *Steuart's* wife. She evidently desired to support her case by denying cohabitation, and it was only when she found that *Torry* was in possession of evidence as to that cohabitation that she abandoned that ground, and did not replace it by an assertion of the marriage.

Major *Steuart* appears to have been in *Edinburgh* from the beginning of 1867 until the 22nd of March of that year, when he returned to *Birnam*. The evidence of Dr. *Dunsmure* is material as to this period. Major *Steuart* consulted him frequently, and always in connection with the effects of drinking. He was summoned to him at *Clyde Street*, on the 17th of February, 1867. He told him he had sent for him to examine Miss *Wilson* to know whether she was in the family way.

He called her *Maggie Wilson*. I told him she would not allow me to examine her, and that I could not do it without her permission. He said, "Oh, but I will insist on it." I made an examination, and satisfied myself that she was pregnant. Major *Steuart* asked me to attend her during her confinement; before I gave him any answer, I asked him whether he was married to her. He said no, certainly not, that he would be very sorry, or words to that effect. This took place in the house in *Clyde Street*, on the 17th of February, 1867. *Q.* Did he say anything else indicating the nature of his relationship with her?—*A.* When he had told me what he had sent for me for, he said, laughing, "a man must have a companion," or something of that kind. When he told me they were not married, I refused to attend at her confinement, and I did not do so. If he had said they were married it is possible I might have attended her, but I did not care about doing so. *Q.* When you went to the house did anything strike you about the appearance of it and its inmates?—*A.* I did not like the appearance of the house; it was such a house as I was not accustomed to go to, and I did not like it. *Q.* What struck you about its inmates?—*A.* I did not like the appearance of the people or of the house. *Q.* What do you mean?—*A.* It is difficult to say; I did not like its appearance. *Q.* Did they look respectable or the opposite?—*A.* I did not know where I was going to at first, but when I got there my impression was that I had got into an improper house. *Q.* Was that from the appearance of the house and the inmates?—*A.* That was my impression. *Q.* Did you see girls going about?—*A.* I did not see them going about; I saw them in another room, and I did not like their appearance. *Q.* Were they loose looking?—*A.* Well, I thought so.

We are told that Dr. *Dunsmure* was lately President of the College of Physicians in *Edinburgh*. His evidence, which is beyond criticism, is of importance as shewing that on an occasion of great interest, and apparently in the presence of the Pursuer, the idea of marriage was repudiated, even where doing so deprived the parties of the professional services which they desired.

In connection with this part of the case, I turn to the evidence of Dr. *Balfour*, who was the physician that did attend the Pursuer in her confinement. He had been in the habit of attending the *Wilson* family professionally, and he visited the Pursuer on

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the 2nd of April, 1867, when her child was born, and for some days subsequently. The name entered in his book is simply "*Wilson*, 27, *Clyde Street*." He says if he had supposed she was a married woman he would have put her married name. He was engaged to attend her about a month before the birth, and he recollects quite distinctly that Mrs. *Wilson* said to him the Major intended to marry her. He does not remember whether the Pursuer was present when she said so or not. She was present during part of the conversation, but he does not know whether she was present at that particular time.

Major *Steuart* was at *Birnam* when the child was born. He had gone there on the 22nd of March and remained till the 30th of June. On the 3rd of April old *Wilson* wrote him a letter in these words:—

Major *Stewart*,

Dear Sir,—I drope you those few lines to let you know that our *Maggie* has been very bad and brought forth a son, a stout healthy child, on Tuesday night about 12 o'clock P.M. Hoping you are well, I remain your humble servt.,

George Wilson.

Wednesday Apl. 3/67. in haste.

The letter of Major *Steuart*, which has the *Dunkeld* post-mark of the 8th of April, appears from its internal evidence to have been written on the 7th, and to be an answer to the letter of old *Wilson*. I do not delay your Lordships by reading it as it has been so recently before you; but I must say of both these letters that they appear to me to be absolutely irreconcilable with the idea that either Major *Steuart*, or old *Wilson*, supposed the Pursuer had been married, or that the child was legitimate.

Major *Steuart* continued at *Birnam*, as I have said, till the 30th of June, and during that interval, on the 28th of April, Mrs. *Wilson*, the mother of the Pursuer, died. There are two letters written by Major *Steuart* from *Birnam* to Mrs. *Wilson* before her death, and three to old *Wilson*, and all of them open to the remarks which I have already made on the letters before adverted to.

How was this child registered? As the illegitimate child of the Pursuer. She attended the registrar herself, and signed the entry stating it to be illegitimate and giving its surname as *Wilson*. The registrar states in his evidence that she wanted it

to take the father's surname; that he explained to her it could not be so registered unless the father acknowledged the paternity and signed the books in company with the mother. She then wanted to have it delayed to see if she could get the father to accompany her. He delayed for some days, when she came back without him and signed the books. It is clear, looking at the Act of Parliament on the subject, and at this evidence, that there was no allegation or suggestion of marriage. If there had been, the child would have been entered as a legitimate child of the marriage. The question was as to its paternity, without reference to marriage, and I cannot look on the evidence of *Collet* as throwing any serious doubt on the statement of the registrar.

It is to this part of the history that eight of the letters addressed by Major *Steuart* to the Pursuer appear to belong. There is considerable ground for doubting whether all the letters to the Pursuer from Major *Steuart* which were in her possession at his death have been produced. Mr. *Galletly* states that she handed them to him to read, and he returned to her from thirty to fifty such letters. Only fourteen are now produced, and in the eight written before the 30th of June, 1867, there is not a word which would suggest the relationship of marriage between the parties. In every one of them he addresses her as "My dear Miss *Wilson*," and there is not a reference in any one of them to the child. Some suggestion was made that Major *Steuart* desired to avoid committing himself in writing to anything which would be evidence of a marriage. It is not likely that such a course would have been submitted to by the Pursuer without remonstrance, and the suggestion is entirely at variance with the character attributed to Major *Steuart* by the Pursuer and her witnesses; nor would it account for the style of old *Wilson's* letter, which is as inconsistent with marriage as those of Major *Steuart*.

On the 17th of June, 1867, the Pursuer paid Major *Steuart* a visit at *Birnam*. She came at 12 o'clock in the day and left at 6 in the evening. Mrs. *Hutton*, in whose house he was lodging, says she announced her as Miss *Wilson;* that she remained in the sitting-room all the time; that the Major went into his bedroom, rang the bell, and desired her to ask Miss *Wilson* if she

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would take a cup of tea. She left by the train, and the Major did not go to the train with her.

About the 1st of July, 1867, Major *Steuart* went to *Edinburgh*, and lived with the *Wilsons* in a flat in *Leith Street Terrace*, to which they had removed, and he remained there till some time in August of the same year. It was during this period that a circumstance took place to which I attach considerable importance. Dr. *Rigg* tells us that some messages came to his house asking him to go to *Leith Street Terrace*, and he refers to a letter which he wrote at the time to Mr. *Condie*, giving an account of the circumstance, which is in these words :—

St. Mary's Catholic Church, Edinburgh,
Thursday Evening.

Dear Mr. *Condie*,—I am sorry to say that poor Major *Steuart* is again making a sad hand of himself here. On Tuesday three several messages were brought requesting me to go to see him at *Wilson's*, 5, *Leith Street Terrace*. Of the first two I took no notice, but by the third messenger I sent a note asking what the Major wanted, and telling him that he knew my dislike to visit him in such lodgings. To this he returned no answer. In the evening, however, I met him in Register Street *very, very* drunk, and looking as if he had come down a chimney. His appearance was truly deplorable, and I could not help saying, "could nothing be done to rescue the miserable man from such a state of degradation?" He made some incoherent remarks about marrying the girl *Wilson*, which made me suspect that she and her friends had wished me to go to the Terrace regarding some affair of that kind, but he was so bad that I could really make no sense out of anything he said.

Simpson, who was employed in the shop of old *Wilson*, speaks of the same occurrence, and though he fixes the date in June, 1867, that must be a mistake for July, because in June Major *Steuart* was at *Birnam*. He says :—

I remember *George Wilson* coming to my house in *Farquharson Place, Preston Street*, just at the back of seven o'clock in a summer morning. I was just out of bed. I had not got breakfast, and I told him so. He said, "Never mind, come away; you will have breakfast in our house." *Q.* Did he tell you what he wanted?—*A.* He said, "The Major is going to marry *Maggie*." He told me that in the lobby. He wanted me to come away directly. I went with him, *Q.* Was he in a very excited state?—*A.* No, I cannot say that he was. *Q.* Did he seem anxious that you should come at once?—*A.* Yes, he wished me to come at once. *Q.* Did he shew great interest in what he wanted?—*A.* Apparently he did. *Q.* When you got to the house did he tell you that the Major was going to marry *Maggie*?—*A.* Yes; and he asked me to go to a place at *St. Mary's Chapel* for the Rev. Mr. *Rigg*. He said to go down and tell Mr. *Rigg* to come up,—that the Major wished to see him very particularly. I went for Mr. *Rigg*

before I got breakfast. I went at half-past seven o'clock in the morning. I did not see Mr. *Rigg* at that time. I then went back to *Wilson's* and got breakfast. He then told me to go down again for Mr. *Rigg*. I saw Mr. *Rigg* that time. I also saw him on a third occasion. I went down three times that day. I gave him the message that Major *Steuart* wished to see him very particularly. The third time I went was just before dinner—some time before one o'clock, I think. The second time Mr. *Rigg* said he would be up shortly. *Q.* Are you sure of that?—*A.* I am almost sure of it. The first time, as far as I recollect, he said he would be up in a short time. *Q.* Did you see him at all the first time?—*A.* No. I saw himself the second time, and the third time he said he would be up immediately. I had no communication with anybody except *George* about that; I had none with the Major.

Mrs. *Hutton* tells us of a conversation she had with the Pursuer, in February, 1868, to this effect:—

"I said to Miss *Wilson*, 'Are Major *Steuart* and you married, Miss *Wilson*?' She said, 'No.' I then said, 'It is a wonder you never tried to get Major *Steuart* when he had got whisky.' She said that he would never write when he had got drink, but that the priest had been sent for once to come to the house to get them married, but that it did not take place."

Now, my Lords, I ask for what purpose was Mr. *Rigg* on this occasion sent for? It could not have been to celebrate a public marriage, for no preparations had been made or steps taken for a public marriage. It could not be to superadd a religious ceremony to a marriage already validly contracted, for the *Wilsons* were Presbyterians and Dr. *Rigg* a priest of the Roman Catholic Church. It must have been in order to make an irregular and clandestine marriage between the Pursuer and Major *Steuart*, which, if her evidence is to be believed, had been already accomplished in a manner satisfactory to all the family.

The baptism of the child occurs next in order of date. It was baptized by Dr. *Rigg*, and the certificate of baptism, dated the 4th of August, 1867, describes it as the illegitimate son of *Margaret Wilson*. Neither father nor mother were present at the baptism. There were only *Mary Wilson*, now *Mary Wyke*, the sister of the Pursuer, who is not produced as a witness, *Margaret Clarkson*, who was employed in old *Wilson's* shop, and a young man, a billiard marker; the two latter being sponsors for the child. What makes this more important is a conversation which Dr. *Rigg* states had previously taken place between him and Major *Steuart*. Major *Steuart*, he says, told him the girl *Wilson* had had a child that he believed was his:

Afterwards he asked me to baptize it. I said to him we had a decided

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objection to baptizing illegitimate children when the improper connection was continued between the parties. I also said we considered baptism as essential, and were most unwilling to allow a child to die without baptism, therefore I would baptize the child; but he must understand it was simply for the child's sake, and not for the sake of the father or mother.

It was after this intimation from Dr. *Rigg* that Major *Stuart* and the Pursuer sent the child to be baptized in the manner I have mentioned.

Major *Steuart* appears to have continued with the *Wilsons* till some time in August, 1867, when he went again to *Birnam* and remained there till about the 1st of October. He lodged on this occasion with Mrs. *Maclagan*. Some Highland games took place at *Birnam* in the last week in August, and during this week the Pursuer came to *Birnam* and remained for four days lodging at the house of *William Harris*. The character in which she was received by *Harris* I prefer to take from the account rendered by him to Major *Steuart*, rather than from his own evidence, to which, after reading his cross-examination, I am unable to give much weight. The account charges for apartments for Miss *Wilson* for four days and attendance, and *Harris* states that this account was made out with the name of Miss *Wilson* by her own desire, as it was to be rendered to Mr. *Melville Jameson*, and the marriage was not to be made public before the Major had a home to take her to. But Mr. *Melville Jameson* was the Major's own confidential adviser, as the Pursuer very well knew, and whatever reasons she may have assigned to Mr. *Harris*, it appears much more probable that the account, if rendered in any name but that of Miss *Wilson*, would not have been received or paid by Mr. *Jameson*.

I may now refer to two witnesses whose evidence in connection with the residence of Major *Stuart* at *Birnam* appears to me most deserving of attention. One is Dr. *Culbard*, a doctor of medicine practising at *Birnam*. Dr. *Culbard* says:

While he stayed at *Birnam* I saw him very frequently; I should think he never was in *Birnam* without my seeing him. I saw him very frequently, both professionally and otherwise; he used to come to my house frequently. His habits gradually got more and more dissipated. I remember his living in the house of *James Hutton*. I have known the *Huttons* all the time I have been in *Dunkeld*. They are respectable people. I visited him in that house frequently. It was the only house in which I visited him, as his lodgings. I have frequently seen him very much the worse of drink, and that for a length of time,—for days. I have seen him in that state both in the house and going about in the streets. I

remember seeing Miss *Wilson*, but I cannot mention the date when I first saw her. *Q.* Was it within a couple of years of his death?—*A.* It was not so long previous to his death; but I cannot give the date. I have seen Major *Steuart* and her going about *Birnam*, but not frequently. I have frequently heard people in *Birnam* speak of them. She was spoken of as Miss *Wilson* by the people in *Birnam*. I never heard her called anything else. I have seen her going about with him when he was the worse of drink, but I have not seen that repeatedly. I heard it reported that there was a marriage between them. *Q.* Was it after that that you spoke to him on the subject?—*A.* I cannot condescend on whether it was before or after. *Q.* Where was it that you spoke to him first of Miss *Wilson*?—*A.* I spoke to him in his own lodgings, and also in my house; it was a subject of frequent conversation. As stated in my former evidence, Major *Steuart* introduced me to her in her lodgings. She occupied separate lodgings from Major *Steuart*, in *Harris* the coachbuilder's. It was late in the evening when I was introduced to her. I received a message to call on the Major, and went to his own rooms, but found that he was out. I remained there for some time, and then Mrs. *Hutton* sent to *Harris'* lodgings to say that I had called. I then went to Miss *Wilson's* lodgings, and he introduced me to her as Miss *Wilson*. I had previously spoken to him about her frequently. *Q.* What had you said to him?—

Pursuer's counsel objected to the line of examination in respect that conversations with Major *Steuart* without the presence of the present Pursuer are not evidence.

Objection repelled, reserving all questions as to the effect of the evidence.

A. I frequently urged on him the propriety of marrying the girl; that was the substance of our conversation. *Q.* Did you say why?—*A.* Because having had possession of the woman, I thought he ought to do what was right and proper by her. *Q.* What did he say in reply?—*A.* He said no,—that he was not married to her, and that he never would be married to her. On the occasion when he introduced me to her by the name of Miss *Wilson* I said "Miss How much?' He turned, with a very significant look and shrug of the shoulders, and answered "Miss *Wilson*." Then the conversation got general, and continued general during the few hours that I remained with him that evening. *Q.* Did he say that quite distinctly?—*A.* Quite distinctly; markedly. She must have heard it. *Q.* Did it strike you that Major *Steuart* treated her as his wife that evening?—*A.* Most certainly not. *Q.* Was his conduct to her at all such as you would have expected from a husband towards his wife?—*A.* I would have have hardly expected such conversation and conduct before a wife. *Q.* Did that strike you at the time?—*A.* Very much so. *Q.* What was the view you took of the relation between them from the way in which he acted towards her?—*A.* That she was simply his mistress. When I left that evening, the Major and I walked about on the road for a considerable time, and he then asked me to go into his rooms at *Hutton's*. He did not stay with Miss *Wilson* that night. *Q.* Was it about the time of the *Birnam* games in 1867, or in 1868, that this conversation took place?—*A.* I am sorry I cannot condescend upon dates, I saw him so frequently. *Q.* When you went into his lodgings, what took place?—*A.* Previous to entering the room, Major *Steuart* seemed as if he had quite enough of drink, and immediately on our entering, he turned and locked the door, and said to me, "What did you mean by putting the question so directly?" I understood that he referred to the question I

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had put—"Miss How much?" I said that I wished to test him. He got rather angry and said did I not believe him,—did I not believe the previous conversations we had had? had I ever found him out telling me a falsehood, and was that the reason why I should put the question so pointedly to him? *Q.* Did he say that angrily?—*A.* Yes, but apparently perfectly soberly. *Q.* Seriously?—*A.* Yes. He seemed to think that I had not trusted him. Nothing further was said about it, and I sat and smoked a little with him. It was early in the morning that this conversation took place. *Q.* In any of the conversations you had with him about Miss *Wilson*, did he ever say in so many words that he was not married to her?—*A.* Distinctly; and that he never would be. He appeared perfectly sincere when he said so. I have had such conversations with him both when he was sober and otherwise. *Q.* Have you ever spoken to Sir *William Steuart* about his son living in the way he was with this woman?—*A.* Not with reference to this woman, but it was my endeavour frequently to reconcile father and son; at first this woman was not referred to in our conversation. *Q.* Did Sir *William* know quite well of the connection with Miss *Wilson*?—*A.* Distinctly. *Q.* Did he ever express to you a wish that his son would marry?—*A.* Yes. He said there might be a prospect of his settling down if he got married. *Q.* What did he say as to the person that he should marry?—*A.* Latterly he was indifferent. I mentioned to the Major the conversations which I so had with Sir *William.* I told him that his father would be pleased if he would marry,—whoever he might marry. The Major said he would choose for himself, and take his own time to marry. I have spoken to him about his boy; he owned the paternity, and was proud and very fond of him.

John B. Pople is the owner of the principal hotel at *Birnam.* His evidence is this:

I knew the late Major *Steuart*, Sir *William Drummond Steuart's* son. He called at my hotel occasionally, and I had frequent conversations with him. I have heard him speak of a Miss *Wilson.* I never heard him speak of her as Mrs. *Steuart.* He always called her Miss *Wilson.* *Q.* On the last occasion he was at *Birnam*, about the end of 1867, did he make any remark to you about the *Wilsons* thinking to get hold of him?—*A.* Yes, he stated to me that he had no doubt they were desirous of getting hold of him, but that he was not married to Miss *Wilson*, neither did he intend ever to be married. I know that they lived in separate lodgings in *Birnam.* I have seen them walking together. I never, on any occasion, heard Major *Steuart* speak of Miss *Wilson* as his wife.

I will now pass rapidly over some months of Major *Steuart's* life. He sold his commission in the army in September, 1867, and out of the proceeds paid old *Wilson* £150 on account of his claims against him for board and lodging and articles supplied in his trade. He then made an excursion to *Paris*, accompanied by the Pursuer, the child, old *Wilson*, and the sister *Georgina.* He returned to *Edinburgh* in November, and about the 24th of December Major *Steuart* went alone to *Birnam.* For some weeks

previous he had not been with the *Wilsons*, and no one appears to have known where he was. He came up from *Birnam* about the 1st of January, 1868, to the *Wilsons*, remained there till the 7th of February, 1868, and then went back to *Birnam*, accompanied by the Pursuer and the child. There is the evidence of Dr. *Middleton* applicable to January, 1868, which I ought not to pass over. Dr. *Middleton* was acquainted with the *Wilsons* for more than twenty years, and had been old *Wilson's* medical attendant. He was attending old *Wilson* in January, 1868, and was then asked to prescribe for Major *Steuart*, who was in bed suffering from bronchitis. He says:

> It appeared to me there were none but young females about him, and I thought they were not proper persons to attend him. I therefore asked the Major who was to attend him to make the poultice and put it on. He turned, and said, "Mrs. *Steuart*." I said, "Who is Mrs. *Steuart?*" He said, "*Maggie*." She was standing beside him at the time. That was the first time I knew about a marriage.

Now, what makes this evidence remarkable is that Dr. *Middleton* states also that he was asked to visit Major *Steuart's* child, and did so on the 9th, 10th, 12th, and 14th of December, 1867. He knew the family, and knew the mother of the child. He knew it was called Major *Steuart's* child, and yet, although intimate with, and attending upon the family, he never was told or knew anything about a marriage before January, 1868.

When Major *Steuart* arrived at *Birnam* on the 7th of February, 1868, Mrs. *Hutton* says:

> When he came he was very much the worse of drink. He brought Miss *Wilson* into the house. I gave them dinner in the dining-room. They did not stay long in the house after dinner; Miss *Wilson* went to Mr. *Harris's* for lodgings. I thought she wished to stay in my house, and I went to Major *Steuart* and asked him if they were married; if they were I was quite willing to give them a room in my house. . . . . He said they were not married; that I might please myself about giving her a room, but that he did not ask me to do it. She then went to the *Harrises*.

On this occasion also the Pursuer is described in *Harris's* account as "Miss *Wilson*." On the 20th of February, 1868, Major *Steuart* left *Birnam*, and *Scotland*, and never saw the Pursuer again. He left without telling the Pursuer, or taking leave of her.

I may now refer to the correspondence between the Pursuer and

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Mr. *Melville Jameson*, the agent of Major *Steuart*. One of the letters is in October, 1867, acknowledging £10, sent to her on account of Major *Steuart*, and signed "*Margaret Wilson*." Besides this there are twenty-seven letters passing between Mr. *Jameson* and the Pursuer from the 27th of February, 1868, till the 19th of October, 1868, when Major *Steuart* died. All these letters address the Pursuer and are written by her as "Miss *Wilson*," and "*Margaret Wilson*." They concern her relations with Major *Steuart*, and her claims upon him; but they nowhere suggest that those relations or claims are in any way founded on or derived from marriage. Major *Steuart* died, as I have said, on the 18th of October, and I shall have presently to refer to some of the evidence connected with his death; but I proceed to complete the written and undisputed evidence. Among the undisputed facts I take to be an interview which the Pursuer had a week or ten days after Major *Steuart's* death with Mr. *Robert Steuart*, a cousin of his father's. This interview is spoken to by Mr. *Robert Steuart*, and by his housekeeper; but it is also spoken to by *Georgina Wilson*, the Pursuer's sister, after the evidence of Mr. *Robert Steuart* had been taken in the action of declarator. I think it clear from this evidence that the Pursuer announced herself as Miss *Wilson*, a friend of Major *Steuart's*. She wished Mr. *Robert Steuart* to induce Sir *William* to make some provision for her child in bringing it up; and I think it clear upon the evidence that she stated she was sorry to say there was no marriage between her and the Major, and even if the exact expression was as *Georgina* represents, "she was sorry she had no documents to shew there was a marriage," it was the same idea that these words were meant to convey. Both Mr. *Steuart* and *Georgina* agree that the Pursuer said if the Major had lived it would have been all right; which again tallies with the evidence of *Christina Kay* that in a letter to Mr. *Steuart* from the Pursuer, written about the same time, she said she would swear that had Major *Steuart* lived he intended to make her his wife.

On the 18th of December, 1868, in reply to a letter written on behalf of the representatives of Major *Steuart*, inquiring whether he had any property which belonged to Major *Steuart*, old *Wilson* stated that he had nothing, Major *Steuart* having taken all his

property with him at various times when going to the north. He added these remarkable words, "He got away several articles which belong to me . . . also some books, and two pictures, one of his son's and one of my daughter's, the child's mother, which was a New Year's present." Can this letter have been written by a witness at a ceremony which he believed to have constituted the Pursuer the wife of Major *Steuart?* Old *Wilson* died on the 11th of July, 1869. His testamentary disposition, dated the 1st of March, 1869, takes notice of all his children. The daughter *Mary*, who was married at the time, he styles "*Mary Wilson* or *Wyke* (wife of *Frederick Wyke*, presently residing in *Liverpool*)," but the Pursuer he styles throughout "*Margaret Wilson*," as if she were unmarried.

We come next to a multiplepoinding raised for the distribution of the succession of Major *Steuart*, in which a claim was lodged by *Robert Denholm* as testamentary trustee of old *Wilson*. *Denholm* claimed for goods sold to Major *Steuart*, for moneys lent, and for board and lodging. The seventh article of the condescendence lodged by *Denholm* states as follows :—

> While boarding in Mr. *Wilson's* house, Major *Steuart* became very intimate with his said eldest daughter, *Margaret Wilson*. The claimant believes and avers that she had a son to him, who is still alive, and is now about three years of age. Major *Steuart* and *Margaret Wilson* were in the habit of sometimes travelling about, and living together. During his residence in Mr. *Wilson's* house Major *Steuart* was extremely irregular and drunken in his habits, so much so that frequent efforts were made to get him to leave the house, but without avail, till finally an exposure of his conduct was threatened, when he left.

As to this statement, *Denholm* deposes that the claim was made on information given him by *Wilson* before his death, except, perhaps, as regards the insertion of the word "extremely." Copies of this record were communicated to the Pursuer and the other members of the family, and no objection appears to have been taken to them.

In June, 1870, the Pursuer was imprisoned on a decree obtained against her by *Mackay*, a jeweller, for articles supplied to her after Major *Steuart's* death. She was proceeded against by the name of "Miss *Maggie Wilson*," and in that name she presented a petition for aliment under the Act of Grace, signing it as "*Maggie*

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Wilson," and on making oath that she had no means to pay her debts she was released.

In the same month of June, 1870, the Pursuer raised a summons of aliment in her unmarried name, *Margaret Wilson*, against Sir *William Steuart* as executor of Major *Steuart* for inlying expenses and aliment in respect of her child. The claim in the condescendence in that action is made upon the footing not of marriage, but of an illicit connection; and a decree upon that footing was made by the Lord Ordinary, and a receipt signed by the Pursuer in her name as *Margaret Wilson* for the sum awarded to her. The subsequent receipts for aliment are signed by her quarterly in the same name. In the same month of June, 1870, Sir *William Steuart* raised an action of declarator and putting to silence against the female Pursuer and her child, in which she did not appear. Evidence was adduced in that action, and a declarator against the marriage was made which in the present action is sought to be reduced. I have only further, on this part of the case, to refer to the marriage of the Pursuer with her husband, Lieutenant *Robertson*. This took place on the 12th of March, 1871. She avers in her condescendence that before her marriage she fully acquainted him with the whole state of matters between herself and the deceased Major *Steuart*. The certificate of her marriage is in evidence, signed by herself. She is married as "*Margaret Wilson*, aged 22 years, spinster."

I have now, my Lords, gone through the evidence in the case founded on written documents, on facts and conduct as to which there is no dispute, and on the evidence of witnesses whose credibility and accuracy cannot be questioned. It is scarcely possible to conceive a stronger body of negative testimony against a marriage. Nothing, in my opinion, could countervail such a body of testimony except the clearest affirmative evidence consistent with the probabilities of the case, and coming from witnesses impartial and unprejudiced on the score of interest and sympathy, shewing that they spoke with accurate recollection, and consistent in their narrative of the facts to which they depose. I return to the evidence by which the alleged marriage is attempted to be established in order to see whether it complies with all or any of these conditions.

Before however making some observations upon that evidence, I ought to remind your Lordships of what we are told as to the relative position and as to the character of the two persons principally concerned. Of the character of Major *Steuart* I have already spoken. His conduct in a moral point of view entitled him to nothing beyond a very low place in the social scale; but as the heir of an old family and the future possessor of large estates his worldly position was greatly above that of the Pursuer. He appears to have been at least double her age, and although he appears to have admired her, there is little if any trace on either side of any romantic attachment between them. Of the character of the Pursuer I do not desire to say more than that looking to the evidence before us, the life which she appears to have led, the atmosphere in which she lived, the scenes which she witnessed, the language which she heard, and in which, unfortunately, she sometimes seems to have joined, cannot be supposed to have been otherwise than unfavourable to the development and cultivation of moral principle and conduct. The acquaintanceship between her and Major *Steuart*, looking to their relative age and position, their character, and the temptations which were certain to accompany it, was one from which her parents might well have been expected rather to have withdrawn her than to have encouraged her in; but they appear to have promoted the acquaintanceship by every means in their power. The evidence of the brother and sister of the Pursuer, though given with a manifest desire to tone down the facts as to this part of the case, sufficiently shews that Major *Steuart* was permitted by the parents of the Pursuer to take away the Pursuer for hours at a time, sometimes on foot, sometimes in carriages, when and where he pleased. The narrative of an excursion to *Murthly*, made by Major *Steuart*, the Pursuer, and her father in December, 1865, when they arrived at *Perth* at midnight, drove on through the night to *Murthly*, got into the house of *Gold*, the land-steward, at three o'clock in the morning, the men being under the influence of drink, and continuing to drink whisky there, and ending by breaking open the door of *Murthly Castle*, is a narrative which cannot be read, especially in connection with the conversation which took place, without astonishment and pain. When to this your Lordships add that

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old *Wilson*, knowing the character of Major *Steuart*, and that he was ejected by reason of his conduct from the hotel in *Edinburgh* where he had been living, received him without remonstrance, and certainly without any reason or arrangement which could justify so unusual a course, into the small floor of rooms where Major *Steuart* and the Pursuer might at any time, and must often have been, left together alone, and would always naturally be closely associated, your Lordships will, I think, be of opinion that the utmost which could have been done was done to place danger and temptation in the way of the Pursuer and opportunity in that of Major *Steuart*.

The history of all that occurred from August, 1865, when Major *Steuart* was received as an inmate in *Clyde Street*, until February, 1866, is either not forthcoming or is spoken of by witnesses who are obviously reticent. Before February, 1866, Major *Steuart* had an illness which confined him to his room. It appears to have been of the usual description. He was, as *Georgina Wilson* says, "coming off drink." He was nursed by the Pursuer, who sat with him in his room. *Georgina* accompanies this fact with the statement that the door was always open so that anybody passing could see into the room, and the bed was facing the door. But as to this, inasmuch as she was at school from half-past eight in the morning, her evidence does not do more than exhibit a natural desire to exclude inferences which are sufficiently obvious. The conclusions which the neighbours appear to have drawn are not to be wondered at. One of the Pursuer's witnesses, *Mortimer*, the butcher living at the corner of the street, says he told Major *Steuart* on the 14th of February, 1866, that there was no person he had a better right to marry than the Pursuer, seeing they were already living as man and wife. And Mrs. *Janet Forman*, or *Wilson*, a sister-in-law of the Pursuer, lets fall in her cross-examination this singular admission, that when her mother told her on the 14th of February, "*Maggie Wilson* is married," she said "I could have told you that six months ago." There might perhaps be some further inferences of the same kind drawn from other parts of the evidence; but it is enough to say that although there is no sufficient ground to hold it proved by positive evidence that sexual intercourse had taken place between Major *Steuart* and the

Pursuer before the 13th of February, 1866, there was every opportunity for it to have taken place; and it is impossible to hold that the allegation of the Pursuer, which is the very foundation of her case, that carnal intercourse between her and Major *Steuart* took place on the 13th of February, after the alleged ceremony, and did not take place before, is established.

Then, my Lords, there are some general questions connected with the alleged ceremony of the 13th of February, 1866, which are upon the surface, and to which no satisfactory answer has been, or, I think, can be given. Why, even if an irregular marriage were necessary or desirable, was no witness outside the family brought to be present? This appears to have been the first observation of *Mortimer*, the neighbouring butcher, when he was told of a marriage the next morning; and if he could be told of it the next morning, it is difficult to see why he could not have been made a witness of it the night before; and if a witness was not to be obtained why could some exchange of writing not have taken place? But further, and above all, what is the theory of the Pursuer as to the reason why an irregular marriage was resorted to? The case made on the part of the Pursuer in the evidence is that the intention and arrangement was that the marriage should be kept secret until, either by his father's death or by the recovery of some property then in litigation, Major *Steuart* should be in a better position to maintain a wife, or that it should be kept secret in order that Sir *William Steuart* might not know of it; and the irregular character of the marriage is attempted to be accounted for by this necessity for secrecy. The same evidence also asserts that the marriage was brought about at the time it was said to have occurred in order to put an end to the scandal which had arisen ("to stop people's mouths" is the expression of *George Wilson*) from Major *Steuart* living with the *Wilsons* and associating as he did with the Pursuer. These suggestions are attended with difficulties which appear to me to be insuperable. If the object was "to stop people's mouths" this could not be done by a secret marriage. The cause of the scandal was open and notorious, it was intended to continue, and nothing but a marriage equally open could terminate the scandal. The cause, therefore, which is said to have brought a marriage about ought to have brought

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about a regular and public and not a clandestine marriage. But on the other hand, can we accept the motive for secrecy which is suggested, so far as Sir *William Steuart* is concerned? He appears to have placed no impediment in the way of his son marrying any person whomsoever; and, although it may appear singular, he is even shewn to have expressed a desire, when he found that his son was going about with the Pursuer in December, 1865, that he should marry her, and this expression of Sir *William Steuart* had been communicated to old *Wilson*. As regards his means for supporting a wife, Major *Steuart* does not appear to have been much embarrassed by the consideration of what his social position required from him. Living as he was content to do with the Pursuer, he would not have been subjected to a greater expense after a regular than after an irregular marriage. And it even appears that, as regards the provision of a residence by his father, he would have benefited and not lost by marrying.

I now come to make a few observations on the witnesses as to the alleged ceremony. The witnesses are two, *George Wilson* and *Kellet*. If the bedding is taken as part of the whole ceremony neither witness was present at the whole. *George Wilson* left before the bedding, *Kellet* did not come into the room until after the conversation had commenced. The evidence of *George Wilson* being that of a relation would not, according to the former state of Scotch law, have been admissible; and both as to this and as to the evidence of *Kellet*, your Lordships will, I think, agree with the force of the remarks made by Lord *Neaves* in a case of *Roxburgh* v. *Watson* (1).

His Lordship says with reference to the evidence in that case:

> But although admitted, it is not only competent but incumbent upon the Court to look upon such evidence with great jealousy, and to weigh it in the most scrupulous manner, to see what is the character and position of the witnesses generally, and whether they are corroborated to such an extent as to secure confidence that they are telling the truth. Nothing would be easier than for a vicious and designing woman to fasten a marriage on a man by the evidence of her own relations and associates, and this more particularly when the man was dead, and his representatives are necessarily at a great disadvantage in disproving the alleged facts, and detecting the imposture. Still more, if the man who is the subject of the fraud has led a libertine life, and is of drunken habits, and if the

(1) 7 McPherson, 21.

woman who forms the scheme against him has been his mistress, additional facilities for fraud and falsehood are afforded, which make it especially the duty of a Court to look with suspicion on the case. It is obvious, too, that a false marriage may easily be trumped up in this way, not merely by inventing the whole story, but by taking as a foundation some facts that in reality may have occurred, quite insufficient to make a marriage, but which admit of being so coloured and dressed up by a liberal *suppressio veri*, and a very slight *suggestio falsi*, so as to assume a relevancy and importance not truly due to them.

I now turn to the evidence of *George Wilson*. In order to test the credibility and accuracy of this witness in points as to which he cannot be contradicted, it is necessary to consider carefully his evidence where he can be contradicted. His object throughout his testimony is to represent Major *Steuart* as a moral and well-conducted man. He says:

> I never saw him the worse of drink at any time. I have seen him take a glass or so, but I never saw him the worse of it. He was tidy in his appearance, so far as I saw. During the whole time I knew him, I never saw him the worse of drink. All the drink I ever saw in my father's house was a glass of ale for supper, and sometimes a glass of toddy before bed. I never saw him the worse of drink. I never saw him drink a great deal. He was a very small drinker, to my idea.

My Lords, if there is one thing which is established on this proof beyond the possibility of doubt, it is that Major *Steuart* was a confirmed and notorious drunkard, and that he was generally in his appearance untidy and disreputable, and it is quite impossible but that *George Wilson*, who had constant opportunities of seeing him, must have known that this was the case.

In his narrative of what occurred after supper on the 13th of February, he states that Major *Steuart* "was sitting in a chair crying, the tears coming over his eyes." He says he was perfectly sober at the time—as sober as when he himself was giving his evidence. It is scarcely possible that both these statements can be correct. In a strong man in middle life, there was nothing in what occurred which could account for tears, except a maudlin imbecility arising from drink, and your Lordships have no security that the state of Major *Steuart* at the time was not that which, recurring constantly at other periods, *George Wilson* describes to be one of sobriety, but which a host of other witnesses call drunkenness.

But there is another detail of the narrative to which both *George*

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Wilson and Mrs. *Kellet* give a conspicuous place. *George Wilson* says Major *Steuart* went down on one knee, put his hand into his waistcoat pocket, and took out a wedding-ring, which he placed on the third finger of the Pursuer's left hand. Mrs. *Kellet* says he went down on his knee, took a ring out of his pocket, "I do not remember which pocket," and put it on the third finger of Pursuer's left hand. So far the narratives agree even in the detail they mention of the third finger, which might well have been overlooked or forgotten. It must, however, be borne in mind that the supper of the 13th of February was not in any way connected with a marriage pre-arranged or expected on either side. It was intended to celebrate Major *Steuart's* birthday, which was really the 11th of February, but that day being a Sunday, the supper was postponed till the 13th. *George Wilson* says he did not believe a marriage was thought of till Major *Steuart* got up and spoke of stopping people's mouths. It is true that *George Wilson* had suggested that his mother had told him something about what she expected, but this is not corroborated by any other testimony, and Mrs. *Kellet*, the confidant of the Pursuer, does not suggest that the Pursuer had said or hinted to her anything about a marriage. But if the marriage was not prearranged or anticipated, how could it have happened that Major *Steuart* should have a wedding-ring ready in his pocket? No answer has been given to that question. Where did he get it? Did he buy it? He was a man perfectly well known in *Edinburgh*, and all his movements seem to have attracted attention. Evidence, one would suppose, could have been procured to shew how he had become possessed of the ring—if indeed, the ring came out of his possession. But the matter does not rest there. The condescendence of the Pursuer in its present form tallies, as to the ring, with the evidence of *George Wilson* and Mrs. *Kellet;* but the original condescendence we find from the judgment of Lord *Shand* was in this form:

> For some days previous to the marriage after-mentioned, Major *Steuart* went to various shops, at which he ordered sundry articles, and in various other ways made preparations for the said marriage. About this time Mr. *Wilson* was pressing Major *Steuart* to say finally when he would marry the said Pursuer. Accordingly, Major *Steuart* determined to enter into a private contract of marriage with the said Pursuer in her father's house, and this resolution was carried out on the evening of Tuesday, the 13th day of February, 1866.

On the afternoon of that day he caused the said Pursuer to put on a black silk dress which she had received from him in a present, to have her hair dressed by a hair-dresser, and otherwise be prepared for her wedding; supper was then served up in the sitting-room; and when it was over, and in the presence of Mr. and Mrs. *Wilson*, the Pursuer's brother *George*, and Mrs. *Kellet*, Major *Steuart* filled the wine-glasses all round; he then went down on his knees, and for the purpose of carrying through a marriage between him and the Pursuer, he said to the Pursuer, "*Maggie*, will you be my wife?" The said Pursuer replied, "Yes;" and then and there accepted the said Major *Steuart* as her husband, and they became married persons. He then took a plain gold marriage-ring from his vest pocket and placed it on the third finger of her left hand, after which he held up his right hand and, while still on his knees, said—"I swear by the Almighty God that I take you for my wife."

This was a story into which the narrative of the ring fitted without inconsistency, and this story must have been told in the first instance from the instructions of the Pursuer. It seems impossible to avoid the conclusion that it was found that this story as told in the original condescendence could not be made to square with the story of a marriage brought about unexpectedly by the pressure of old *Wilson*, and that the greater part of the story was changed to meet this altered aspect of the ceremony, but that unfortunately the incident of the ring was left unerased.

Of Mrs. *Kellet's* evidence I need not say more than I have done already, beyond remarking that she varies from *George Wilson's* evidence as to Major *Steuart* weeping. She says,

I did not observe him weeping on the night of the ceremony. I did not notice tears in his eyes. I am not very good at seeing, unless I have my glasses on.

Under these circumstances, it might perhaps be asked, how is she able to say the ring was placed on the third finger?

There is some further evidence, not of any one present at the alleged ceremony, but closely connected with it in point of time, to which I should refer. One of the witnesses who gives evidence of this kind is *Agnes Forbes*. She was a servant of the *Wilsons* on the 13th of February, 1866, and at the time of the trial it appears she was living with the Pursuer. I attach little importance to her evidence. She is, I think, discredited by the testimony allowed to be adduced after the case passed into the Inner House. But in addition to this, she is contradicted on several important points. Your Lordships remember she places the visit of *Caw*, the bailiff, about ten o'clock on the morning of the 19th of February, whereas

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Caw is positive it was at four in the afternoon; and from the nature of the visit it is not likely that he could be mistaken. She says, further, she never in her life saw Major *Steuart* drunk. She says also, she heard the Pursuer, in the case in the police court, to which I have referred, say she was legally married to Major *Steuart*, the contrary being, as I think, clearly proved. But there is a portion of *Agnes Forbes*' evidence which suggests a further difficulty. I have already commented on the allegation of the Pursuer, that the marriage was to be kept secret; and Mrs. *Kellet* says Mrs. *Wilson* was very particular in saying it should be kept quiet lest it might hurt the Major; and the Major used to say to Mrs. *Kellet* he liked her "because she was not a blab." *Agnes Forbes*, however, states that the Pursuer was called Mrs. *Steuart* quite publicly in the house, and to everybody who came out and in; and that in speaking of her outside, she always spoke of her as Mrs. *Steuart*. It is in fact, extremely difficult to know, not only what reason can be suggested for keeping the marriage, if it had taken place, a secret, but also whether, wherever and whenever a marriage was talked about, it was talked of as a secret. In my opinion where a marriage was talked of it was talked of openly, and in order to serve a purpose which could not be attained except by speaking of it openly.

I must notice the evidence of three other members of the family. *Georgina Wilson* was about fourteen years of age at the time. She was not present at the alleged ceremony. She states, as *Agnes Forbes* did, that the day following she saw a wedding-ring on her sister's finger. But some part of her evidence is important as shewing how little reliance can be placed on the evidence of interested relatives in such a case. She is asked:

Q. On what footing did you understand that he came to the house?—*A.* I understood that he was engaged to my sister. *Q.* From the time he was turned out of the hotel?—*A.* Yes. *Q.* And before he came to the house at all?—*A.* Yes. *Q.* Have you heard both your father and mother speak of that?—*A.* Yes. *Q.* Did they say that there was an engagement before he came to the house at all?—*A.* Yes. *Q.* Then you did not understand that he was in the house as a boarder or lodger?—*A.* Yes he was, but he did not pay. I understood he was to pay. *Q.* Did your sister and the Major act all along from the time he came to the house as engaged people?—*A.* Yes; they used to go out together. They frequently went out alone. I cannot say where they went,—perhaps for a drive, and sometimes for a fish dinner at *Newhaven*.

It need hardly be said that this is inconsistent both with all the other evidence in the case and with the condescendence. Again, after much fencing, she says that it was from her mother, and not from the Pursuer at all, she understood that the Pursuer was married. She always "took it" she was married. "She did not say anything to me about it; she never made me her confidant." Finally, in order to establish a difference of treatment before and after marriage, she tells us this:

> He gave my father presents to give her. The Major never kissed my sister in my presence; he was more of a gentleman than to do that; I don't think lovers generally do that. Until after the night of the marriage he never kissed her in my presence. He gave the presents to my father to give to her. If my father was standing beside her he would perhaps give them to herself. If it was a *Stuart* tartan dress or a scarf, he gave it to her before my father; he came into the shop and gave it to her before my father. After the marriage he always gave the presents direct to herself.

Alfred Wilson was still younger than *Georgiana*. He is brought forward to say that he, though not ten years of age at the time, noticed the marriage-ring on the Pursuer's finger, after she came out of her bedroom the next morning, and that he saw them in bed together, the next morning (the fifth person, if we are to believe the evidence, brought into the room for that purpose).

There was another sister in the house, who was older than *Alfred*, *Mary Wilson*, now Mrs. *Wyke*. She, for some reason, is not examined, although the Pursuer obtained a commission under which she might have examined her in *England*, where she was residing.

Janet Wilson is sister-in-law of the Pursuer. She also, as she says, saw the Pursuer and Major *Steuart*, in bed on the morning of the 14th of February. This was between ten and eleven, a singular circumstance, when we remember that *Georgina Wilson* states that before she went to school at half-past eight on that morning, she had seen the Pursuer leave her bed-room. *Janet Wilson*, however, says Major *Steuart* then told her that the Pursuer was his wife. The same, or the next day, Major *Steuart* went with the Pursuer to *Leith*, to *Janet Wilson's* house, and said to *Janet Wilson* of the Pursuer, "this was his wife Lady *Steuart*;" again, a statement difficult to believe, if he had told her that she was his wife a few hours before. The cross-examination of *Janet*

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Wilson, however, and the circumstance that neither a Mr. or Mrs. *Forman*, who are said to have been present during the visit to *Leith*, are produced, make it impossible to rely on the accuracy of the statements of this witness.

I pass over, without any detailed observation, the evidence of a number of witnesses in the case who speak to statements of conversations with the Major, or the Pursuer, or both, in hotels, in places of amusement, in casual conversations, in drinking parties, in the course of which the Major called the Pursuer his wife or Mrs. *Steuart*, or spoke of her as such, and spoke of her child as his boy. These would in any case be equivocal acts, and would have to be considered with reference to the circumstances under which the statements were made, and in the present case, in a number of instances, the statements were obviously made in places and under circumstances where for the purposes of the moment it was necessary that the Pursuer should appear to be Major *Steuart's* wife. The statements made upon these occasions are not, taken altogether, nor are any of them for a moment to be put in comparison with the deliberate statements made on important occasions, when no object was to be gained, to Dr. *Dunsmure*, Mr. *Rigg*, Dr. *Simson*, Dr. *Culbard*, Mr. *Pople*, and others. But there is in the present case a further peculiarity with regard to the statements relied upon by the Pursuer. I have submitted to your Lordships the points on which I think the evidence of the alleged ceremony is not to be taken as trustworthy, but I am far from saying that I think there was no foundation for that evidence. I do not believe that a valid marriage *per verba de præsenti* took place or was supposed by any of the parties to have taken place. That something took place which was not a marriage, but which yet might be represented, and was meant to be represented, in a way "to stop people's mouths"—to use the expression of *George Wilson*—is, I think, very probable. The place where this would be used, and the persons to whom it would be used were places where the *Wilsons* were known, and the persons with whom they were accustomed to associate. Those were the persons whose "mouths" were "to be stopped," and if it answered the purpose of "stopping their mouths," that was all that was required. It may well be that the *Wilsons* hoped for and

desired something more, but they may have been content to wait for the chance of getting something more at a future time, or of the cohabitation gliding, if they could make it do so, into a marriage by habit and repute. If this is a just view of what occurred on the night of the 13th of February, it would account for the statements as to the Pursuer being married made to *Mortimer* the butcher, and to other persons in or about *Edinburgh*, with whom the *Wilsons* were associating, and for the statements of a very different kind made upon all serious occasions by Major *Steuart*.

I have now only to refer to the circumstances, so far as they are material, connected with the death of Major *Steuart*. He was living at *Hythe* in October, 1868. He had been drinking, his servant *Budd* tells us, "very heavily," and had a very bad attack of *delirium tremens*. While labouring under that attack he pushed a stick through his windpipe, on Thursday, the 15th of October, and he died on the following Sunday night, the 18th. On the 15th of October, that is on the Thursday, *Budd*, his servant, telegraphed by his desire to *Thornby Hall*, near *Rugby*, for Captain *Cooper*, who had been a brother officer of Major *Steuart* in the 93rd Regiment, and with whom he had kept up a correspondence, although they had not met since 1859. *Budd* also telegraphed for Mr. *Jameson*, the law agent of Major *Steuart*. Captain *Cooper* arrived on the evening of Friday, the 16th, and the arrival of Mr. *Jameson* took place at midday on Saturday, the 17th. It is to be observed that it does not appear that Major *Steuart* desired the Pursuer to be sent for or in any way to be communicated with. Mr. *Jameson* says he informed Major *Steuart* of his success in the litigation relating to some personal property in the Court of Session; that he appreciated this success; that he was intelligent up to his death, and was not in delirium; but that speaking appeared to occasion difficulty to him, and there was no prolonged conversation. He says he alluded to his son, and referring to the money which would come under the decree of the Court, said, "Well, *Cooper* and you will take charge of the matter, and pay my debts and see to the boy." Mr. *Jameson* says that of his own accord, and without any instructions, he prepared the draft of a settlement that might have been executed if approved of by the Major, but it cannot now be found. He says it must have been prepared on the Saturday

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night or probably the Sunday forenoon, but that on the Sunday he was not in a fit state to sign it. He cannot remember that he spoke to Major *Steuart* of the Pursuer. He cannot remember whether the Major, at the time he said "the boy," may have added "and the mother." The impression of the conversation on his mind was that the boy was the individual who was favoured. This is the evidence of Mr. *Jameson*, given by him when called as a witness for the Pursuer. To this, however, must be added a description of the state in which Major *Steuart* was, which was given by Mr. *Jameson* at the time, in a letter which he wrote to Mr. *Galletly*, in *Edinburgh*, and from which description I do not understand that Mr. *Jameson* now desires to recede. It is dated "*Bath*, Monday, 19th Oct. 1868," and is in these words:

My dear Sir,—Our poor friend the Major, to whose deathbed I was called by telegram on Friday, died at *Hythe* this morning. With the exception of an occasional look and word of intelligence, he was not in a state to make any settlement of his affairs, and unless his father, whom I have seen here, is disposed to give effect to his verbally expressed wishes gathered from occasional moments of isolated responses, the executry must be arranged by law. He intended that his friend Captain *Cooper* (a very excellent man, who was also at his deathbed) and I should be his executors; that we should get the money now due to him, pay all my advances and expenses and his debts, and then retain the remainder for behoof of the boy. I had prepared such a document giving effect to his understood wishes, but he was not so long conscious as to be able to execute it.

Captain *Cooper* describes the interviews which he had with Major *Steuart* in these words:—

I went into the Major's bedroom, which was shewn to me by *Budd*. I found the Major in bed. When I went in, he mistook me for another officer who had been in the regiment, and said, "Hillo, *Goldsmith*." The room was dark—duskyish. There was an officer of that name in the 93rd. I was not in the least surprised at the Major so addressing me, for I had often been mistaken for Captain *Goldsmith* before. I am like him, and have been mistaken for him on several occasions. I said to the Major, "I am not *Goldsmith*—I am *Dick Cooper*." The Major recognised me then, and said, "Oh, how are you?" He was very unwell. I sat up with him most of the night. I had very little conversation with him; I did not like to have any that night.

On the Saturday morning I again saw the Major. He was considerably better; he had slept and taken some nourishment. When I went in, he recognised me at once. I was in his room from time to time throughout the day, twenty minutes or half-an-hour at a time. I spoke to him occasionally. I remember that on that day the Major made rather a pointed observation to me. He said, "You are married, aren't you?" I said, "Yes, I am, and so are you, aren't you?" He said, "Yes, I am." He also said, "Have you got a son?" I said, "No, not

yet." He said he had one, and he said something which led me to believe that he was very proud of his son. That was the whole conversation.

It is remarkable that in this statement it is not suggested that the Pursuer was referred to, or her name mentioned, and the only words which can be relied upon are the words "Yes, I am," the weight to be attached to which would depend on the amount of intelligence of the dying man as to the question and of the accuracy of the listener as to the answer. But the question put by Major *Steuart* to Captain *Cooper*, "You are married, aren't you?" is remarkable, because it appears that Major *Steuart* had received, not long before, a letter from Captain *Cooper*, dated the 24th of February, 1868, speaking to him of his wife, and sending him a message from her. I own that, even if no further light could be thrown upon these three monosyllables spoken to Captain *Cooper*, I should not, bearing in mind the silence of Major *Steuart* on the subject of the Pursuer to his confidential agent Mr. *Jameson*, have been disposed to attach to them the weight which they seem to have carried in the Court of Session. But there is some subsequent evidence of Captain *Cooper* which requires to be taken in connection with that to which I have already referred. He says:

Mr. *Jameson* came that Saturday afternoon. I did not know him by sight, and asked *Budd* to point him out to me as soon as the packet arrived, which he did. *Q.* Did you speak to Mr. *Jameson* about the marriage?—*A.* I told him, first of all, that I knew everything connected with Major *Steuart*. *Q.* It was in that way you put it?—*A.* Yes. I told him I was his most intimate friend. I learned from Mr. *Jameson* that the Major had recovered a sum of money from Sir *William Steuart*. I think the amount was £11,000 or £13,000, or something like that. That was the first time I had ever heard of it. I saw the Major after learning that fact, but I did not make any reference to the money to him, except in this way, that I said he ought to make provision for his wife and child. I did not like to allude to the money, because the Major himself had not told me about it; but I suggested that he should make provision for his wife and child. *Q.* Did you use the word "wife?"—*A.* Yes. *Q.* What did he say?—*A.* He said it would be all right. *Q.* What did you understand by that?—*A.* I understood that he would do something with Mr. *Jameson* so as to make a provision for his wife and child. I stipulated with Mr. *Jameson* that his just debts should be paid first. I had some conversation with Mr. *Jameson* on the subject afterwards. My conversation about the debts was not with Major *Steuart*, but with Mr. *Jameson*. *Q.* Did you tell Mr. *Jameson* anything about Scotch marriages?—*A.* I said I disliked Scotch marriages. *Q.* Did you say anything about the son of a fishing-tackle maker's daughter not succeeding to *Murthly Castle*?—*A.* Yes, I said I did not care about that. I understood that some papers were drawn out

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by Mr. *Jameson* on the Saturday night. I saw him with some papers that looked like legal documents. We thought the Major was doing better on the Sunday morning. I went to church that morning, and when I returned I thought he was better. He spat a good deal, and passed blood from his throat. A medical man saw him, and we thought him somewhat better on the Sunday morning. I cannot tell why the paper was not signed; I expected from what had taken place that it would be signed. Nobody told me that it was signed, and I did not think it my business to ask, as Major *Steuart's* agent was there. Eventually I found that it was not signed.

There is in this a statement of much that Captain *Cooper* thought or said, but little that was said by Major *Steuart*. Captain *Cooper* suggested that he should make a provision for his wife and child, although Mr. *Jameson* thought him not in a state to execute an instrument for the purpose of making such a provision. Major *Steuart* said "it would be all right," a phrase which, even if he understood what he was saying, might be interpreted in many different ways. But the best insight into the impression really produced on the minds of both Captain *Cooper* and Mr. *Jameson* by what occurred at *Hythe* is to be found in two letters which passed between them a few days subsequently, after they had had the conversation to which Captain *Cooper* refers as to Scotch marriages. Mr. *Jameson* writes to Captain *Cooper* from *Perth*, on the 2nd of November, 1868, as follows:

My dear Sir,—There is no word from Sir *William Steuart* in reply to mine, and I now expect none. Mr. *Condie* sent to me to-day for the address of the medical attendant, and I gave him Mr. *Giles's* address. It has just struck me that it may be to communicate with him to ascertain if the Major, during his last illness, was ever able to say a word intelligently as to his affairs, or to indicate with a serious mind his wishes in regard to them, as represented by me. I have written Mr. *Giles* by this post, requesting a certificate as to the state of Major *Steuart's* mind when I was with him. I told him that I was aware that he frequently wandered, when sleeping or dreaming, but that when aroused and spoken to he seemed to recognise the persons addressing him, and answered intelligently on the subject of conversation; that these were, of course, quite casual and momentary, there being a reluctance on your and my part to fatigue him with any continuous conversation, but that these were quite sufficient to indicate to me the intentions he had, namely, that you and I should take the charge of the money, pay his debts, and see to the boy; the money, the debts, and the boy being all severally the subjects of conversation before between him and myself. I presume Mr. *Giles* can have no hesitation to give such a certificate, and if he sends it to me, good and well. My letter will, at all events, caution him, I should think, against saying anything imprudent to Sir *William* or his agent, Mr. *Condie*.

I had your letter, and am glad you approve of mine to Sir *William*. Unfortunately, in the absence of any written document duly signed by our late friend, the law confers the right of administration on the father, and we cannot legally compel him to recognise any expression or wish on the part of his son. My letter was simply meant, as any other appeal can solely mean, as an appeal to his honourable feelings. The money was the Major's is not denied by the father—the father had no claim to it. He had not even paid him an allowance for a long time, and any one might suppose that under these circumstances he would at once say, "I won't touch it; let Captain *Cooper* and Mr. *Jameson*, my son's only friends, do with it according to my son's wishes. I refuse to avail myself of the advantage given me, namely, by the absence of any legal will."

The debts of course he *must* pay, and the boy will have a claim for aliment, but it would be covered, so far as law is concerned, by an annuity of £20 per annum, perhaps less, so that £400 would do for this instead of £4000, the half of the free succession which he *ought to give*, and this will be pocketing for himself £4000.

The girl Miss *Wilson*, the mother of the boy, has *no legal claim*, and we would fail in any attempt at law in her behalf. If we get the £4000, we would be able to do something for her, if we found her deserving, by the allowance of a suitable board for the boy.

Nothing can be clearer than that Mr. *Jameson*, the writer of this letter, knew, and expected Captain *Cooper* to recognise, that there was no question of marriage in the case. There appears to have been another letter from *Jameson* to Captain *Cooper*, and then, on the 12th of November, 1868, Captain *Cooper* replies in these words:

My dear Sir,—I am in receipt of yours of the 11th, and enclose you a letter I received in reply to one of mine from Dr. *Bond*. I should like to know how far we can legally force Sir *William*, for I fear that as he has not treated you with common courtesy he might refuse to see me. I would give him one more chance, and, if you think fit, might mention that I will be happy to call on him and explain matters, and that if he will see me, I will go and wait on him at any hour or day he may think. If he won't do this, I should be inclined to enter an action against him. Believe me yours, &c.,

Richard Cooper."

I cannot read this letter as referring to any claim of the Pursuer or her boy founded on marriage. The letter appears to me in effect to concur in Mr. *Jameson's* statement, that on this head there was no legal claim, and to suggest an action against Sir *William Steuart* on the only foundation on which Mr. *Jameson* had said it could be maintained, namely, for aliment.

I do not delay your Lordships by an examination of the conflict of testimony between *Budd* and Captain *Cooper*, as to whether

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the former told the latter at *Hythe* that Major *Steuart* was "married right enough." *Budd* denies that he made any such statement, and it is due to him to say that he has been called as a witness on behalf of the Pursuer as well as of the Appellant, and although he lived for a considerable time in the service of Major *Steuart*, it is not pretended that he ever said to any person else of his master that he was married. It may well be the case that Captain *Cooper* believed the meaning of *Budd* to be that which he expressed in his evidence, but a very slight variation of expression, or a qualification of tone or gesture, would have greatly modified the effect of the answer of *Budd*, and it is remarkable that Captain *Cooper* himself admits that *Budd* immediately afterwards spoke to him of the Pursuer, and said that "Miss *Wilson*" had not been telegraphed for.

I have now, my Lords, at much greater length than I could have desired, adverted to such portions of the voluminous evidence in this case as appeared to me to require notice. I could have been well content to rest my decision upon the grounds expressed by the minority of the learned Judges, and especially by Lord *Deas* and Lord *Shand*, with nearly the whole of whose very able judgments I concur; but I have deemed it necessary, owing to the respect I entertain for the learned Judges who compose the majority, to indicate the grounds upon which I am compelled to differ from their opinions. The burden which lay upon the Pursuer to establish a marriage in this case I think she has not discharged. On the contrary, her opponents have been able, from circumstances, many of them singular, to present a body of evidence of unusual weight, derived from documents written, acts done, and declarations made, all bearing, with a strength almost irresistible, against the marriage. To countervail this evidence, the biased, inconsistent, improbable, and inaccurate evidence of the alleged ceremony is, I think, altogether inadequate, and the interlocutors affirming the marriage ought, in my opinion, to be reversed, and the Appellant assoilzied, with expenses, in the Court of Session.

LORD HATHERLEY, after elaborately criticising a large portion of the evidence, expressed his entire concurrence with the Lord

Chancellor's opinion, and his assent to the proposition that the interlocutors complained of should be reversed.

LORD O'HAGAN:—

My Lords, after the supposed marriage the Pursuer's dealings with tradesmen were all in her own maiden name. So was her complaint in the police court, eight months after it, on the hearing of which we have the evidence of four witnesses, including the advocate by whom she was cross-examined, to prove that she swore she was not a married woman. Then we have the statutory registration of her child's birth, vouched by her own signature, and describing it as illegitimate. We find her sued and decreed, without objection, in her maiden name. She gave receipts for payments for her boy, which were manifestly made as for an illegitimate child. After Major *Steuart's* death, she distinctly stated to Mr. *Steuart*, a cousin of the Major, that she was not married to him; she wrote as *Margaret Wilson*, to Sir *William Steuart*, Mr. *Jameson*, and others; she petitioned the magistrates of *Edinburgh* in that name. She sued Sir *W. Steuart* in that name successfully for the aliment of her son, as an illegitimate child. In that name she accepted payment and gave receipts on account of it; and finally, in that name, she married her present husband.

Consider it as we may, this very singular and painful case is not free from many difficulties which have not unnaturally produced diversity of judgment upon it, and which can never, in this world, be satisfactorily removed. But your Lordships must decide, as best you can, on the balance of testimony and argument; and on the whole, I am of opinion that that balance strongly inclines in favour of the Appellant, and that, accordingly, the appeal should be allowed.

LORD SELBORNE:—

My Lords, it is clear that the *Wilsons* desired, if they could, to bring about a marriage between Major *Steuart* and the Pursuer; and they did whatever they could (in the way of conversation with relatives and others) to give a colour of marriage to the connection between them. The theory that Major *Steuart* was willing to marry the Pursuer on the condition that the marriage should be

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kept secret, in order to withhold the knowledge of it from his father, is, in my opinion, conclusively disproved.

It was strongly urged by the counsel for the Pursuer that the difficulty of believing that the Pursuer's father and mother could have assented to the cohabitation of their daughter with Major *Steuart*, in their own house, and surrounded by their other children, on any other footing than that of marriage, was so great as to preponderate over all the difficulties on the other side. My Lords, I cannot agree with that view. It is evident that Mr. and Mrs. *Wilson* were ambitious of having the heir of *Murthly* for their son-in-law; and it became necessary for them to choose whether he should go elsewhere, or remain in their house on the avowed footing of conjugal or quasi-conjugal cohabitation.

Under the law of irregular marriage in *Scotland*, it is not (I am sorry to say) by any means incredible that persons, generally reputed to be respectable, though not fastidious, may sometimes reconcile their moral sense to the notion of an inchoate marriage, to be matured and perfected by the progress of events, of which they hope and expect a favourable issue; and, considering what were the alternatives open to them if the Major was not then willing to bind himself by an actual marriage, they might offer this excuse to their own consciences, and justify by it the language which they held to their family and their friends.

As to declarations by the parties in a Scotch marriage case, the Report of the Royal Commission on the Laws of Marriage (1) states that

> The most express declaration, oral or in writing, by both parties, that they are husband and wife will not make them so unless the Judge is satisfied that the inward intention of their minds was in accordance with those outward words or acts. This has been held, not only as to declarations concerning the past, but even as to *verba de præsenti* which, if sincerely spoken, would have themselves constituted a marriage.

In the case of *Jolly* v. *McGregor* (2) a marriage irregularly celebrated before a clergyman of the Established Church was set aside as a nullity because the Court was satisfied that the parties had no real matrimonial intention and never regarded the ceremony as binding.

(1) 1868, pp. 20, 21. (2) 3 Wils. & Sh. 85.

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Whether the continuance of such a state of the law, is, on the whole, for the benefit of society or not, it is for the Legislature, and not for this House in its judicial capacity, to consider.

I concur in the judgment proposed by the rest of your Lordships.

Adjudged that the interlocutors appealed from be reversed; the Appellant assoilzied from the conclusions of the summons with expenses below; and that the cause be remitted back to the Court of Session to do therein as shall be just and conformable with this adjudication.

Agents for the Appellants: *Connell & Hope.*
Agents for the Respondents: *Paddison & Son.*

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Reference to the Arbitration of a fluctuating Body.

The "*Society of Inspectors of Poor for Scotland,*" an unincorporated and fluctuating body, held to be proper arbitrators of a question referred to them by two parishes as to the maintenance of a pauper.

Per THE LORD CHANCELLOR (1):—There is nothing in law that I have discovered to prevent a valid reference to the arbitration of such a body as the *Society of Inspectors of Poor for Scotland.*

Per LORD HATHERLEY:—The benchers of the Inns of Court decide matters of the gravest importance; and yet they are not a corporation, but a fluctuating body.

Rectification of the Decree below to suit the Pleadings.

The House varied the decree complained of, so as to base it on the language and substance of the pleadings.

Per THE LORD CHANCELLOR:—The majority of the Court below place the case not on the footing of a reference to arbitration and an award, but on the footing of an agreement. Both parties, however, having treated the case as one of reference and arbitration, and the Court below having accepted

(1) Lord *Cairns.*

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the pleas to that effect, I think they should have based their decision upon those pleas.

Per LORD SELBORNE:—It is very important that the judgments of the House should be consistent with the manner in which the cases are pleaded by the parties.

UPON a reference by the parish of *Rathven* and the parish *of Elgin* to a body called the "*Society of Inspectors of Poor for Scotland,*" the Society decided that the parish of *Rathven*, and not the parish of *Elgin*, was bound to support a certain pauper named *Charlotte Grant* as a proper object of parochial relief.

The parish of *Rathven* acquiesced in the award; but afterwards impeached it on the ground that the Society was an unincorporated fluctuating body, and that no valid reference had been made to them.

The Court of Session decided that there was no formal reference to arbitration and no formal award, but that there was an agreement to submit to the opinion of the "Society"—an agreement not in itself binding, but rendered so by acquiescence—the Court holding that in this way the parish of *Rathven* "took on themselves the support of the pauper, and could not withdraw from that liability" (1).

Against this judgment the parish of *Rathven* appealed to the House, having for their counsel Mr. *Cotton*, Q.C., and Mr. *W. A. Brown*, of the Scotch Bar.

Mr. *John Pearson*, Q.C., and Mr. *Lancaster*, of the Scotch Bar, appeared for the Respondents.

At the close of the Appellants' argument the Law Peers, without calling on the Respondents' counsel, delivered the following opinions:—

THE LORD CHANCELLOR (2):—

Your Lordships have here the clearest proof of intention on the part of the parochial Board of *Rathven* to refer this case to arbitration; the inspector being directed to assent to any competent

(1) Court of Session Cases, 4th Series, vol. i. p. 1155.

(2) Lord *Cairns*.

arbiter that the parties might agree upon; and then, overriding the whole, the continuing authority of the managing committee to deal with the affair as might seem best for the interest of the parish.

On the 13th of April, 1860, the Inspector of *Elgin* writes to the Inspector of *Rathven*: "I should like to be able to say whether, in the event of *Elgin* being willing to refer the case to the *Society of Inspectors of Poor for Scotland*, your Board would agree to that proposal." Then on the 22nd of February, 1861, the Inspector of *Elgin* again writes to the Inspector of *Rathven* with regard to the choice of arbiters: "What do you think of the *Society of Inspectors for Scotland?*" On the 23rd of February, 1861, the Inspector of *Rathven* replies: "On the 1st of July, 1859, I see I offered to refer to the society you now propose to refer to." Therefore, your Lordships have it that, at all events as regards the Inspector of *Elgin* and as regards the Inspector acting on behalf of *Rathven*, there was an offer and an agreement to take as arbiter the *Society of Inspectors of Poor for Scotland.*

On the 1st of May, 1861, the inspector of *Elgin* "laid before the Board a letter from the Inspector of *Rathven* agreeing to join in a reference to the Society; and the Inspector of *Elgin* was instructed to prepare a joint minute along with the Inspector of *Rathven.*"

My Lords, I apprehend that it would be impossible, in this state of things, to arrive at any other conclusion than that before the reference took place the Board of Management, who had complete power to give authority in the case, were aware that the arbiters selected by the Inspector in pursuance of the direction given to him were the *Society of Inspectors of Poor for Scotland.*

There was no objection, in point of law, to choosing them as arbiters. They were eminently qualified to undertake the task, and, as a consultative and deliberative body, to pronounce an opinion upon the subject referred to them.

Your Lordships have heard an elaborate argument which proceeded to shew that in *Scotland* there must, as regards the choice of arbiters, be a *dilectus personæ*, and you were referred to authorities which shew that where there is a contract beforehand to refer to arbitration, and the contract runs as a contract to refer to

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the arbitration of individuals not named, or of individuals filling an official position, or of individuals composing a fluctuating body, and where, therefore, at the time the contract is made to refer to arbitration future disputes, which may not arise for years, there can be no *dilectus personæ:* there a contract of that kind cannot be urged and founded on to oust the regular jurisdiction of the Courts.

My Lords, I should be sorry to express any opinion tending to throw any doubt upon the propriety of those decisions. But they appear to me to have no application whatever to the present case. Is it the law of *Scotland* that where there are two persons competent to refer a dispute to arbitration, and where those persons may select the arbiter at their option, there is invalidity in point of law in the selection as arbiter of an incorporated society, consisting of a number of members? My Lords, I have anxiously attended to the argument, in order to find out whether there was any authority in the Scotch books upon that subject; and certainly none has been produced to shew that a reference of that kind would be invalid. I apprehend that in this country there is nothing whatever which would prevent persons who are minded to refer to arbitration from referring to the arbitration of an incorporated society, consisting of a number of members, or to the members of an unincorporated society. How the arbitration so made should be worked out—by what numbers it should be decided—whether at a public meeting, or in what way—is quite a different question, which may be kept distinct from the question of whether such persons can be selected as arbiters. I therefore arrive at this stage of the case, my Lords, that I find those who were competent to bind the parish of *Rathven* willing to refer to the Society of Inspectors as arbiters, and that there is nothing in law, that I have discovered, which prevents a valid reference being made to a society of that description.

Then, my Lords, arises the question, was there any irregularity in the proceedings under that reference, and if there was, has it been condoned or waived by those who might have objected to it?

The Parochial Inspectors appear to have agreed to adopt the course of sending each his own statement of the case. Accord-

ingly they sent separate statements, which are of a very argumentative description, and contain some not very precise references to facts.

I apprehend that when persons refer to arbitration, if in place of appearing before the arbiters, and asking them to examine witnesses, they agree amongst themselves either upon a joint statement of the case, or that they will each send their own statement to the arbitrator, for him to form his opinion upon, that is a competent course; and if that course is taken, and the award made upon that basis, neither party can resile from that award. And when I say "neither party," I do not lose sight of this, that the persons who managed the mode and form in which the proceedings were conducted, were the Inspectors, and not the parochial boards. A parochial board, in a matter of this kind, must of necessity act by their proper officer. The parochial board could not in person have attended to the detail of an arbitration of this kind. I apprehend that, having authorized their officer to take all the steps of procedure which might be thought necessary, they cannot object to an irregularity assented to by him. The two counter statements having gone before the arbiters, the arbiters appear to have considered that, being a numerous consultative body, it would be convenient to request two of their members to make a single statement collected from the counter allegations, with such further information as they might think it necessary to ask for. They thought it necessary to ask on one point for further information: and a letter in duplicate was sent to the two contending parties, the Inspector for *Rathven* and the Inspector for *Elgin*, asking for that further information. On these materials—not in any way overlooking the two counter-statements of the parish officers, but adding this further single statement made by the two members of their body—on these materials the Society pronounced its decision. No other materials having been tendered to the Society, and the parochial officers being satisfied that the decision should proceed upon them, it appears to me that it would be the grossest injustice to hold that either of those parochial authorities, or either of the parishes which they represented, should afterwards be allowed to turn round when the award was given against them, and object to it upon the ground that

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other materials might have been presented to the Society, and that the facts might have been put before them in a form more elaborate.

The Society having come to their determination, a determination unfavourable to *Rathven*, that determination was announced immediately to both parishes. Your Lordships have not got the formal submission to arbitration before you. It has, however, been most justly conceded at your Lordships' Bar, that there was in some form a submission, although it is lost. In point of form, also, your Lordships have not got the mode in which the decision or award of the Society was communicated, but it was entered upon their own minutes, and it appears from the letters of the Inspectors that it was made known to them immediately afterwards. In point of fact, Mr. *Bremner* (1), having got the decision, wrote to the Society (and this certainly was an irregularity on his part) demurring to the decision, and suggesting that they had overlooked some important fact, and he received from them an answer, saying that his letter had been brought before them, and that they considered, notwithstanding his letter, that the decision they had arrived at was the proper decision.

My Lords, I am bound to say that up to this point I find that which appears to me to be a valid reference to arbitration. I find arbiters selected who could not be objected to, I find proceedings before those arbiters which, if not of the most usual and ordinary kind, perhaps I might add not of the most convenient kind, for the purpose of deciding the question referred, were yet proceedings which were adopted without being in any way objected to by those who alone had the right to object; I mean the parochial officers acting on behalf of the parishes.

When that decision was thus made known, there were payments to be made under and in consequence of the decision. Accordingly the parish of *Rathven* repaid to the parish of *Elgin* the sums which the *Elgin* parish had advanced to the Lunacy Board in respect of this pauper, and the parish of *Rathven* paid to the Lunacy Board the sums which had become necessary for her maintenance in an asylum. It was not until November, 1864, that any attempt was made to resile from what had been done. In

(1) The Inspector of *Rathven*.

November, 1864, Mr. *Bremner* wrote this letter to Mr. *Stiven* (1), on behalf of the parish of *Rathven*—"I hereby intimate that we do hereby withdraw our admission of liability for the support of *Charlotte Grant*, and repudiate the finding of the *Association of Inspectors for Scotland*, in so far as the same is against the parish of *Rathven*, which finding is contrary to the decision of the Supreme Courts in the case of *Margaret Whyte Huntley* v. *Bellie and Urquhart*" (2).

In these cases it is always important to find upon what ground, and when first, the controversy arises, and the right to repudiate is placed. Now, I find here no allegation of want of authority. I find here no allegation of invalidity in respect of the arbiters chosen; no allegation of irregularity in the proceedings; but I find Mr. *Bremner* professing to write on behalf of his parochial board (although it is suggested now that the letter was written without the authority of the parochial board) intimating that they "repudiate the finding of the Association of Inspectors," not in consequence of its invalidity or its irregularity, but because there had been a recent decision of the Supreme Court in opposition to the law as found by that award. And, my Lords, on the 8th of December, 1864, after the matter had been brought before the Board, and when a minute had been passed in these terms: "*Charlotte Grant, Elgin Asylum.*—The meeting withdrew the admission of liability made by the Inspector in this case, and directed the Inspector to intimate such to *Elgin*," Mr. *Bremner* again wrote to Mr. *Stiven* thus: "In the terms of minute above written, I have to intimate to you that this Board have withdrawn their admission of liability in this case from and after the date of my last letter to you on the subject."

Now, while of course the parish of *Rathven* are entitled to any legal right which may be theirs, and if the award is invalid they are entitled to say they are not bound by it, yet, as regards the morality of this proceeding, I am bound also to say that I have never seen a clearer case in which there is an attempt made by way of afterthought to discover irregularities and to find objections to an award which no person ever thought should be impeached at the time it was made.

(1) The Inspector of *Elgin*.

(2) 3 Macp. 34.

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I can find nothing which would entitle your Lordships to say that there was here otherwise than a valid submission to arbitration, and an award by the arbiters with regard to which, if the proceedings had been in any respect irregular, the irregularity was joined in and condoned by him who had the conduct of the proceedings on behalf of the parish of *Rathven*. And I find that the parish, when the award was made known to them, for it is not pretended that they made the payments without knowing that the award had been made, were well content to take that award as it stood, and not to examine into the mode in which the authority given by them to their Inspector had been acted upon.

My Lords, this would decide the case upon its merits, and would be fatal to the contest of the Appellants at your Lordships' Bar. I am aware, however, that expressions appear to have fallen from the learned Judges composing the majority of the Court of Session, which seem to shew a desire on their part to place the case, not upon the footing of a reference to arbitration and an award, but upon the footing of some species of agreement which does not amount to a reference to arbitration, but is yet, in their opinion, binding upon the parties. The form which the interlocutor appealed from has taken is this: "Find that the parochial board of *Rathven* agreed with the parochial board of *Elgin* to abide by the opinion of the Society of Inspectors. Find that an opinion of the said Society on that matter having been expressed and intimated to the parties, the board of *Rathven* acquiesced in and acted upon that opinion, and they cannot now withdraw from the liability thus admitted and acted upon."

In the conclusions thus expressed I entirely agree; but the wording of the interlocutor appears to suggest that there may be something in the nature of an agreement between these parties which is not an arbitration and an award. Now the 4th and 5th pleas of the parish of *Elgin* are these:—"The parish of *Rathven* having referred to arbitration the question of liability for the support of the pauper, as between it and the parish of *Elgin*, is bound by the decision in the arbitration, and is not entitled to defend this action to the effect of throwing the said liability on the parish of *Elgin*. The parish of *Rathven* having acquiesced in the decision in the said arbitration, and acknowledged their liability under

it by making payments to the Pursuers in respect of the pauper, are not now entitled to repudiate the same to the effect of attaching liability to the parish of *Elgin*."

My Lords, I think it would have been more consistent with the form of the case, with the facts proved before the Court, and with those considerations of law to which I have endeavoured to call your Lordships' attention—that the Court should at once have accepted the 4th and 5th pleas in law of the parish of *Elgin*, and have based their decision upon those pleas. I shall, therefore, move your Lordships, that in this respect the interlocutor of the 10th of July, 1874, should be altered by omitting the special findings which I have read, and by simply, after recalling the interlocutor of the Lord Ordinary complained of, allowing the 4th and 5th pleas in law of the parish of *Elgin*, and then remitting to the Lord Ordinary to proceed with the cause.

My Lords, this, which is an alteration in form and not in substance, ought not, I think, to make any difference as regards the costs of the appeal. Therefore, my Lords, I move that the Appellant pay the costs of the appeal.

LORD HATHERLEY:—

We were told that by the law of *Scotland* no reference could be made without a clear and distinct *delectus personæ;* and that a reference to a fluctuating body was utterly valueless, and that it was impossible for any sort of homologation to take place which would give validity to the decision. I should be extremely sorry if it were necessary for your Lordships to come to any such conclusion in this or any other similar case. This Society seems to have been composed of men eminently qualified to express a judgment upon a point of the character which had arisen in the dispute between these parishes. It seems to have been one of the principal duties of their lives to attend to matters of this description. Lord *Benholme* (1) seems to have thought that there was an inherent incapacity in a tribunal of this sort by reason of its consisting of members fluctuating from time to time, and by reason of the fact that all the members might or might not be present at a

(1) 4th Series, vol. i. p. 1166.

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meeting when any particular matter was brought before them for discussion and decision. Now, an example has occurred to me, which I may mention as one that will be well understood by everybody, and that is the case of the benchers of the Inns of Court, who decide matters of the gravest importance to individuals—affecting their character, their status, and their fortunes; and so satisfactorily do they decide those questions, that it is very rarely that their determinations are reversed or interfered with by the Judges of the land who may revise their adjudications. And yet they are not a corporation—they are a fluctuating body, and it is not always—indeed but seldom—that you can know who are, or who are not, to be the particular persons who will sit in judgment upon a particular matter. But why that circumstance should disqualify them from being selected as arbiters to determine a case in dispute, it appears to me very difficult to comprehend.

It seems to be made out that by the law of *Scotland* an agreement *ab ante* to refer contingent and possible disputes to a person not named, but to be named by some one afterwards, is not such an agreement as the parties can be held to, when a dispute has actually arisen and the one party wishes to avail himself of it against the will of the other. Either party is at liberty to resile from such an engagement. Perhaps some of the cases seem to point to something further, namely, the question whether, when the dispute which was contemplated as possible has arisen, you can enforce an engagement to refer it to a person who is to be named by a third person, and who is not expressly and accurately ascertained. There seems to have been the same, or a similar question also (I think the authority only goes to the case of future disputes) as to the force of a contract to refer disputes to a body like a Chamber of Commerce, which in some respects might be said to bear a resemblance to this body, the *Society of Inspectors*. But I listened in vain to find the authority cited of any decision of the Courts of *Scotland*, which would authorize this House in saying that when a dispute has arisen, and when a reference has been made to an ascertained body of men, and when the body to whom the reference is made has arrived at its decision or made its award, that award is not binding upon the parties who had so submitted their case to the tribunal they had chosen, merely

because it is composed of a number of individuals, some of whom may from time to time be changed.

No authority of that kind has been produced, and I apprehend, my Lords, that in this respect the decision of the body, to whom the reference was made in this case, was the decision of a body perfectly competent to decide the question between the parties. I think they have decided the question between the parties, and I think that decision not being quarrelled with for any irregularity other than the simple fact of its being given by such a body as I have described—the decision not being quarrelled with for any irregularity which has taken place in the conduct of the proceedings of that body—must now be held to be a binding decision upon all the parties.

Therefore, my Lords, I think that your Lordships cannot have the slightest doubt about deciding this case against this Appellants.

LORD O'HAGAN :—

My Lords, I am of the same opinion, and I think that the appeal should be dismissed with costs.

LORD SELBORNE :—

My Lords, agreeing with your Lordships I do not think it necessary to add anything to what has been said as to the merits of this case; but, with respect to the form of the order, I may observe that it is, in my opinion, very important that the judgments of the House should be consistent with the manner in which the cases are pleaded by the parties. I find that the pleading of the Respondents, the parish of *Elgin*, is this. They adopt in substance the earlier articles of the condescendence of the Lunacy Board, including particularly the 5th article, in which it is expressly stated that the "parishes agreed to refer the question of liability to the decision of the *Society of Inspectors of the Poor for Scotland* as arbiters in the matter," and that they decided it accordingly: and in their pleas in law they expressly say, in No. 4, "The parish of *Rathven* having referred to arbitration the question of liability," "is bound by the decision in the arbitration;" and the 5th plea in law is to the same effect. Now, my Lords,

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if I were obliged to say that the facts as they appear, having regard to the pleadings, do not support these averments and pleas in law, I confess I should feel some considerable difficulty in falling back upon any *tertium quid* such as seems to be suggested by the peculiar phraseology of the interlocutor. But, my Lords, I do not feel any difficulty, having regard to the actual proceedings in the case, and the issues which the parties came into Court to try, in holding that we are in a position to found ourselves upon these pleas in law and to treat them as well established.

I have referred to the manner in which the facts are pleaded on behalf of *Elgin*. On the other hand, I find that in the condescendence on the part of *Rathven* these points only are taken by way of defence; firstly, that they never agreed to refer to any arbiter at all; secondly, that there never was any joint submission or formal minute of reference ever entered into; thirdly, that the Defender, the Inspector of *Elgin*, did agree to the reference of the question to the *Society of Inspectors;* and, fourthly, that the Society is not a competent arbiter either in the terms of the authority which was given by the *Rathven* Board or in point of law. Beyond that there is no objection that I can discover, nor is there any statement that there was not a proper award, or deliverance, or finding, and that if these objections fail they have others. And their pleas in law are entirely to the same effect. In the second and third pleas they plead that their Inspector had no authority to refer the question of liability to the *Society of the Inspectors of Poor for Scotland*, and that therefore they are not bound by the decision of that body. The third plea in law is that—

The parochial board of *Rathven* having entered into no submission or reference of the question of liability for the maintenance of the pauper to the *Society of Inspectors of Poor for Scotland*, the Defender as Inspector foresaid is not bound by the opinion or decision of that body.

The fourth plea of *Rathvin* is that—

Under the instructions received by the Defender he could not competently refer the question of liability to that society.

And fifthly that—

The reference of the liability for the maintenance of the pauper to the *Society of Inspectors of Poor for Scotland* was incompetent and inept, and everything that has followed thereon is null and void.

They do take the objection *inter alia* that there was no proper submission to the *Society of Inspectors*, but they do not anywhere suggest that there was any objection on the ground of informality in the deliverance or award, if the other objections fail. With regard to the submission, there was a signed minute, and it appears to me that a very reasonable inference can be drawn that that signed minute if produced would be a proper minute of reference, the authority of it establishing the belief which your Lordships' opinion will have expressed. With regard to the authority of *Bremner* to refer, the point appears to be taken notice of by the Lord Justice Clerk (1). Perhaps that may have been partly the ground for the peculiar phraseology of the interlocutor. But, my Lords, having regard to the facts to which my noble and learned friends have referred, seeing that the decision of the arbiters was accepted and acted upon, and is not challenged in the record, I think your Lordships can have no difficulty in adopting the conclusions of the pleas in law in the manner which has been proposed.

Ordered and adjudged, That the interlocutor complained of be varied by omitting the special findings following; (namely,)—

Find that the parochial board of *Rathven* agreed with the parochial board of *Elgin* to abide by the opinion of the *Society of Inspectors* referred to in the record, as to the settlement and support of the pauper lunatic in question: Find that an opinion of the said Society on that matter having been expressed and intimated to the parties, the Board of *Rathven* acquiesced in that opinion, and proceeded to implement their agreement by admitting their liability to pay, and by paying to the Board of *Elgin* the amount of bygone board which had been paid by the said parochial board of *Elgin* to the Pursuers, amounting to £85 16*s.* 2*d.*, and further paid to the Pursuers the board of the said pauper from March, 1863, to December, 1864: Find that implement and payment were thus made by the parochial board of *Rathven* in the full knowledge of the material facts of the cause, and find that in this way the Board of *Rathven* took fully and finally upon themselves the

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support of the said pauper, and that they cannot now, in a question with the parish of *Elgin*, withdraw from the liability thus admitted and acted upon.

And it is further ordered, that the fourth and fifth pleas in law of the parish of *Elgin* be and the same are hereby allowed: And it is further ordered and adjudged, that with this variation of the said interlocutor, that interlocutor and the other interlocutors complained of in the said appeal be and the same are hereby affirmed. Affirmed with costs.

Agents for the Appellants: Messrs. *Holmes, Anton, Greig, & White.*

Agents for the Respondents: Messrs. *Martin & Leslie.*

END OF VOL. II.

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—— Not a crime: *See* DIVORCE. 2.

—— By husband—Judicial separation—custody of children—no general rule: *See* JUDICIAL SEPARATION.

ADVANCES "AGAINST FREIGHT"—*Special Stipulation.*] Where the charterers of a ship stipulate that they shall be entitled to insure their advances "against freight," at the owner's expense, and where they fail to insure, they have, in the event of the ship perishing, no claim against the owners for repayment.

Repayment of Advances for Freight—General Law.] *Per* The Lord Chancellor [*Selborne*]: It does not appear to me that in this case we ought to decide any question of general law. WATSON & Co. *v.* SHANKLAND - - - - 304

ADVANCES TO FACTORS—5 & 6 *Vict. c.* 39.] A merchant who has enabled his factor to raise money fraudulently can claim no redress against the party who has, *bonâ fide*, made the advance. —The goods or symbols of property entrusted to the factor may be regarded by unsuspecting third parties as his own, and dealt with accordingly under the *Factors Act*, 5 & 6 Vict. c. 39. VICKERS *v.* HERTZ - - - - - 113

AGRICULTURAL LEASE, *if silent as to Sports, confers no Right to sport on the Lessee.*] *Held*, by Lord *Westbury* and Lord *Colonsay* (agreeing with the Court below), that by the Scotch law if an agricultural lease is silent as to hunting, shooting, fishing, or other similar sports, the right to these enjoyments does not pass to the lessee, but remains in the landlord, by law, without any express or special reservation.—*Per* Lord *Westbury*: The peculiar general principle of the law of *Scotland* is, that an agricultural lease includes only rights which are agricultural in their nature. —*Per* Lord *Colonsay:* The question is, Did the landlord part with rights accessory to his property, but which have no connection with the purposes of an agricultural lease? That where the lease is silent as to fishing, an exclusive right to fish passes to the tenant seems rather an extravagant proposition. COPLAND *v.* MAXWELL 103

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APPEAL ON MATTER OF FACT—*Per* Lord *Chelmsford:* An appellate tribunal ought not to be called upon to decide which side preponderates on a mere balance of evidence. To procure a reversal it must be shewn irresistibly that the judgment complained of on a matter of fact, is not only wrong, but entirely erroneous.

Protracted Litigation.] Censure pronounced by the Law Peers on the protracted litigation of cases involving but a small amount of property. GRAY *v.* TURNBULL - - - - 53

APPOINTMENT *with Directions and Conditions unsanctioned by the Power.*] *Per* The Lord Chancellor [*Cairns*]: Where a gift made under a power is accompanied by directions and conditions *ultra vires*, the gift will be valid and the directions void.—*Per* Lord *Selborne:* Where there is an appointment authorized by the power, but with a superadded wish, desire, or condition, not authorized by the power, the appointment is valid; but the superadded wish, desire, or condition necessarily fails unless the appointee elects to give effect to it, which he may do without vitiating the appointment.—A mere purpose or direction unwarranted by the power, though it may have operated as a motive to the appointment, will not bind the appointee.

Personalty not within the Entail Statute.] A husband and wife, under a power in their antenuptial contract, appointed that £25,000 should be "settled and belong to their eldest son, and other members of their family in succession, being heirs in possession of their entailed estate":—*Held*, that the eldest son and heir in possession of the entailed estate was entitled to the £25,000 as absolute fiar, free not only from the fetters of

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—— Power of: *See* Father's Power of Appointment.

ARBITRATION—An agreement to settle by arbitration excludes the jurisdiction of the Courts: *See* Compulsory Reference to Arbitration.
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AUCTION, SALE BY: *See* Retail Shop; Sale by Sample.

AWNING OVER MAIN DECK: *See* Ship's Measurement.

BANKRUPTCY—*Fraudulent Preference—Severe Statutory Penalties.*] By the *Scotch Bankruptcy Statute* of 1856 (19 & 20 Vict. c. 79) it is enacted that if any creditor shall receive a gratuity, or enter into any secret or collusive agreement for facilitating the bankrupt's discharge, such creditor shall not only forfeit his claim against the estate, but pay to the trustee thereof double the amount of the gratuity.—Under this statute it was held by the House (reversing the decree below) that a creditor who had been secretly induced by a sum of money to acquiesce in a dividend which he had previously opposed, was subject to the penalties of the statute;—although he had stipulated and obtained an assurance when receiving the money that it should not come from the other creditors; and although he returned the amount with interest immediately on being told that his conduct in accepting it was a breach of the law, and was censured.—*Per* The Lord Chancellor [*Hatherley*]: If a creditor can obtain for himself an advantage of this description, he is at once enabled to frustrate the policy of the Bankrupt Law, which is to secure to all the creditors an equal distribution, and to give the bankrupt himself advantages when the property is fairly made over.—*Per* Lord *Chelmsford:* The receipt of the bribe constitutes the offence. Collusion and secrecy are immaterial.

Negation of Judicial Discretion.] The statute enacts, that upon a petition by the trustee or any creditor, the Lord Ordinary shall decree the penalties prescribed, "*if no cause be shewn to the contrary.*" The Court below (Lord *Kinloch diss.*) held that these words gave them a discretion, in the exercise of which, under all the circumstances, they abstained from enforcing the penalties. This decision reversed.—*Per* Lord *Chelmsford:* If a discretionary power was meant to be given, the power would have been expressed in the clearest language.—*Per* Lord *Westbury:* It is quite out of the question to hold that this statute confers a discretionary power to apply its enactments or not. They are passed to secure commercial morality, and we must enforce them without any attempt to mitigate their severity. Carter *v.* McLaren - - - - - 120
—— Wife's legitim—Claim of creditors: *See* Wife's Legitim.

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"BEDDING"—Kissing—Interchange of matrimonial words: *See* Marriage. 2.

BELLS FOR CHURCH AND TOWN—*Not for Dissenters.*] On the re-erection of the *Peebles* Church towards the end of the last century, the heritors of the parish and the magistrates of the town agreed that a steeple to be annexed to the church should be raised at the cost of the town, the bells to be employed for the parish as well as for the town:—*Held*, by the House, that the bells should be rung for the purposes of the church and for the purposes of the town, but not for the purposes of dissenting congregations. Magistrates of Peebles *v.* The Minister and Kirk Session of Peebles. [460

BILL OF EXCHANGE—*Discharge of the Acceptors—Indorsers still bound, but their Rights intact*] *Held*, by the House, affirming the judgment appealed from, that a release to the acceptors by the holder of a bill which had been dishonoured and protested, did not discharge the indorsers; the holder retaining the bill, and expressly reserving his claim against any obligants other than the acceptors; who, though exonerated by the holder, continued still subject to the claims of the several indorsers. Muir *v.* Crawford - - 256

BILL OF LADING.] Case in which it was held that the master of a ship, by signing bills of lading, did not bind the owner to deliver the amount of goods specified in the bills, but the amount (a much smaller quantity) which had been actually put on board.

Deficient Cargo—Dead Freight.] What is called dead freight is defined to be simply an unliquidated compensation recoverable by the shipowner from the freighter for deficiency of cargo. —*Per* Lord *Westbury:* Unless a specific sum be fixed for dead freight, all reasonable charges must be deducted.

Lien.] By express stipulation there may be a lien for dead freight.—*Per* Lord *Chelmsford:* The charterparty here gives an express lien for the deficient cargo; but the case can hardly be called one of unliquidated damages—the master not having brought home any other goods than those of the freighters. McLean & Hope *v.* Fleming [128

BONÂ FIDE PERCEPTIO ET CONSUMPTIO.] The doctrine of, how far received in the Law of *England*: *See* Teinds. 2.

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CHILDREN, CUSTODY OF—Judicial separation for husband's adultery—No general rule: *See* Judicial Separation.

CHILDREN'S PROVISIONS—when constituting a debt, inventory duty not chargeable: *See* Inventory Duty.

CHURCH BELLS—Not for Dissenters: *See* Bells for Church and Town.

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COAL AND LIMESTONE—Reservation of: *See* Minerals.

COMPANIES ACT, 1862—*Shareholder's Liability.*] A Scotch company, whose *nominal* capital was £105,000, announced that £100,000 had been paid up, and that only £5000 could be called for. Relying upon this representation a gentleman, resident in *London*, purchased, as a transferee, 300 shares; and paid his proportion of the outstanding £5000 to the company. The liquidator alleged that this gentleman "knew, or *ought* to have known," that the company was a bubble; and proposed to make a call upon him of £30 for each of his shares:—The House (reversing the decree below) *held*, that the liquidator was wrong; the shareholder having done all that could legitimately be demanded of him under his contract:—It is not incumbent on a shareholder to suspect fraud or institute inquiries where all seems fair and conformable to the requirements of the statutes.—The liability of a shareholder is to be measured by his contract, as based upon the statutory documents, which are registered for the purpose of protecting the shareholders on the one hand, and the creditors on the other.—The Court cannot expand the contract; nor will it fix upon a party any engagement larger or other than that into which he has he has entered.—There is nothing to warrant a contrary doctrine in *Overend & Gurney* (Law Rep. 2 H. L. 325), where the shareholder's contract was enforced, but in no respect altered; the contract, as it existed at the time of the winding-up, being the sole measure of liability.—The Court of Session having ruled, in effect, that a shareholder could not stand upon his contract, but was bound beyond it, at the suit of the liquidator—their decision was reversed.

Position and Power of a Liquidator.] *Per* Lord *Chelmsford*:—The liquidator appears to be merely substituted for the company.—*Per* Lord *Westbury*: The rights of creditors when enforced by a liquidator, must be enforced by him in right of the company; and he cannot recover that which the company itself could not have recovered.—Doubt expressed by The Lord Chancellor [*Hatherley*] on this point. Waterhouse *v.* Jamieson - - - - - - 29

COMPENSATION UNDER THE RAILWAY STATUTES.] No claim can be made in respect of a damage for which the claimant would not have had an action supposing the Railway Act had never been passed.—The damage must be done by the construction of the works; and not afterwards, when the works have been completed.

Noise and Smoke of Trains.] *Held* (reversing the judgment appealed from), that statutory compensation cannot be claimed by reason of the noise or smoke of trains, whether part of the claimant's lands be taken or not.—*Per* The Lord Chancellor [*Hatherley*]: Anticipated damage from the noise and smoke of trains does not appear to be a proper subject of estimate for compensation under the railway statutes.—*Per* Lord *Chelmsford*: The Legislature having given the promoters no power to annoy the occupiers of neighbouring property with smoke,—an injury from

COMPENSATION UNDER THE RAILWAY STATUTES—*continued.*

this cause is not the subject of compensation, but a ground of action. A man may have a right of action and a right of indictment where he cannot claim statutory compensation. City of Glasgow Union Railway Company *v.* Hunter - 78

COMPETENCY—Presumption of: *See* Presumption. 1.

COMPULSORY REFERENCE TO ARBITRATION.] Where under an agreement, legislatively confirmed, the parties were bound to settle by arbitration all differences that might arise between them as to the meaning and effect of the agreement, or as to the mode of carrying it out, it was *held* by the House that the jurisdiction of the Courts was, by this agreement, excluded, and that all disputes arising under it must be settled by arbitration.—*Per* The Lord Chancellor [*Cairns*]: We have here no room for the application of the doctrine as to voluntary agreements; but have simply to consider the case arising upon an Act of Parliament, forcing the parties to have their disputes settled, not by the ordinary tribunals of the country, but by arbitration. Caledonian Railway Company *v.* Greenock and Wemyss Railway Company - - - 347

CONJUGAL RIGHTS ACT (24 & 25 Vict c. 86) *See* Wife's Legitim.

CONSENSUAL MARRIAGE BY DECLARATION: *See* Marriage. 1.

CONSIDERATION — Inadequacy of — When extreme—a ground for equitable relief: *See* Presumption. 1.

CONTEMPT OF COURT—*Imprisonment.*] When a Judge, in the legitimate exercise of his jurisdiction, is defiantly disobeyed, he may commit the offender instantly to prison for contempt of Court.

Process-caption.] A document *in manibus curiæ* having been carried away by an agent regardless of the Judge's remonstrances:—*Held*, that a process-caption was a proper remedy, and that notice of its issue was unnecessary. Watt *v.* Ligertwood - - - - - - 361

CONTRACT—*Liability of a Shareholder.*] The liability of a shareholder is to be measured by his contract. *Overend & Gurney* (Law Rep. 2 H. L. 325) commented upon. Waterhouse *v.* Jamieson — - - - - 29

2. —— *Obligation to submit to Mineral Workings.*] A feu of land was granted reserving the subjacent minerals, and stipulating that the feuar should have no claim against the Superior or his tenants in respect of any damage that might arise from the working of the minerals. Damage having arisen, the feuar obtained from the Court of Session an interdict prohibiting the mineral workings complained of; but the House of Lords revoked the interdict—holding that the feuar had made a contract which bound him to submit to its consequences. *Per* The Lord Chancellor [*Cairns*]:—This interdict imposes on the Superior an obligation which it was the express object of the contract to relieve him from. The fact that the contract was improvident cannot alter the construction of a special stipulation. *Per* Lord

CONTRACT—*continued.*

Chelmsford: It is the safest and best mode of construction to give to words free from ambiguity their plain and ordinary meaning. BUCHANAN *v.* ANDREW - - - - - - 286

CONTRACT BY STATUTORY IMPROVEMENTS COMMISSIONERS: *See* STATUTORY IMPROVEMENTS.

CONVEYANCE OF HERITAGE—*Indispensability of the word "dispone."*] *Per* The Lord Chancellor [*Cairns*]: Looking to the unanimity prevailing in the Court below, looking to the decisions which from time to time have been pronounced, and the *dicta* which have fallen from Judges in *Scotland* upon the subject; looking also to the expressions of text writers as evidencing the constant practice of the profession, it would be impossible now to open or disturb the rule as to the absolute necessity of having the word "dispone" in a conveyance of heritable property.

An invalid Instrument of Conveyance cannot revoke a valid one.] *Per* The Lord Chancellor: The second deed being inefficacious as a conveyance, it appears to me to be entirely inoperative as a revocation. No case can be produced where, either in *Scotland* or *England*, a mere alternative inconsistent disposition, not valid in itself, has been held to revoke an earlier and effective disposition of the same property.

Intention to revoke: the only receivable Evidence.] *Per* Lord *Hatherley:* The Court can discover an intention to revoke only in the altered disposition, If the altered disposition fails, the revocation must likewise fail. ALEXANDER *v.* KIRKPATRICK 397

COSTLY LITIGATION—*Expressions of Regret.*] *Per* Lord *Chelmsford:* It is really lamentable to think of the enormous expense incurred in this case.—*Per* Lord *Westbury:* Such things occur in the appeals from *Scotland* day by day. FRASER *v.* CRAWFORD - - - - - - 42

CREDITORS—Wife's legitim—Husband's right: *See* WIFE'S LEGITIM.

CROWN—Right of, on attainder: *See* TREASON.

CUSTODY OF CHILDREN—No general rule: *See* JUDICIAL SEPARATION FOR HUSBAND'S ADULTERY.

DAMAGE FROM NOISE AND SMOKE OF TRAINS: *See* COMPENSATION UNDER RAILWAY STATUTES.

DEATH-BED DEED—*Affecting Heritage—Reducible.*] To protect sick persons from importunity, and to save their heirs from mischief, the law of *Scotland* declares that if a deed affecting heritage be executed on death-bed, it may be set aside *ex capite lecti.*

Exception when the Deed is in execution of a Faculty.] The rule, however, does not apply when the deed is made in execution of a faculty or power.

Provision for Widow and younger Children.] Circumstances under which provisions for a widow and for younger children were set aside by the heir in possession under an entail. NEWTON *v.* NEWTON - - - - - - 13

DEBT—When children's provisions constitute a debt, inventory duty not chargeable: *See* INVENTORY DUTY.

DESCENT OF PEERAGES TO HEIRS MALE—In the absence of contrary limitation, the invariable presumption of law is, that a peerage descends to heirs male, and not to heirs general.—The legal presumption in favour of heirs male may be rebutted by authoritative evidence, but not by inferential deduction. Were this rule departed from, many peerage claims would start up. HERRIES PEERAGE - - - - 258

DESTINATION—Presumption against change of: *See* PRESUMPTION. 3.

DISCRETION, JUDICIAL—Negation of, as to statutory penalties: *See* BANKRUPTCY.

"DISPONE"—Conveyance of heritage—Indispensability of the word "dispone:" *See* CONVEYANCE OF HERITAGE.

DISSENTERS: *See* BELLS FOR CHURCH AND TOWN.

DIVORCE—*Consequent Forfeiture of Donatio propter Nuptias—Tocher—Divorce for Desertion.*] Divorce for desertion involves a forfeiture of all claims under a marriage settlement, whether ante-nuptial or post-nuptial; the statute of 1573, c. 55, declaring that "the offenders shall tyne and lose tocher and *donationes propter nuptias.*"

Divorce for Adultery.] Divorce for adultery involves the same penal forfeiture as that which arises from divorce for desertion, although the statute is silent as to divorce for adultery.—*Per* Lord *Chelmsford:*—The penalty is the legal consequence, not of the adultery, but of the decree of divorce:—*Held* by the House, that a rule lauded by the highest legal authorities in *Scotland*, and acted upon for centuries, ought not to be disturbed upon appeal.

Tocher.] *Per* Lord *Chelmsford:* If tocher be paid over to the husband at the time of the marriage, it may be that upon a divorce on account of his adultery, he may not be bound to restore it. HARVEY *v.* FARQUHAR - - 192

2. —— *Against a Wife—Her Insanity no Bar.*] A petition for divorce against a wife was met by an allegation of her insanity and consequent inability to defend herself. The Court below appointed a guardian *ad litem* on her behalf. Upon a verdict of her insanity, proceedings were suspended; but with liberty to the husband to apply again to the Court in the event of her recovery. The husband appealed to the House of Lords, insisting that the wife's insanity ought not to bar, or impede, the investigation of the charge of adultery brought against her. The House adopted this view; and, reversing the order appealed against, sent the case back with directions to proceed.

Divorce on behalf of an insane Husband or Wife.] *Per* Lord *Chelmsford:* The question whether proceedings for the dissolution of a marriage can be instituted *on behalf* of a lunatic husband or wife, it is unnecessary to determine, as it involves considerations very different from those which occur in the *Mordaunt* case.

Opinions of the Consulted Judges as to Divorce in Cases of Insanity.] Chief Baron *Kelly*, Mr. Justice *Denman*, and Mr. Baron *Pollock* concurred

DIVORCE—*continued.*
in holding that divorce may be asked and decreed on behalf of, or against, a lunatic, the Court appointing a guardian *ad litem* for protection; but Mr. Justice *Keating* and Mr. Justice *Brett* were of opinion that the insanity of either husband or wife is an absolute bar to divorce.

Adultery not a Crime.] By the law of *England* adultery, though a grievous sin, is not a crime; and the analogies and precedents of criminal law have no authority in the Divorce Court, a civil tribunal. — *Per* Lord *Hatherley:* In the proceedings against a criminal, every step is arrested by his or her becoming a lunatic. But the procedure in divorce is not a criminal proceeding. Mordaunt *v.* Moncreiffe - - - 374

DOCUMENTS, WHEN OBSCURE — Long-continued practical construction accepted: *See* Lease.

DONATIO PROPTER NUPTIAS—Forfeiture of: *See* Divorce. 1.

ENTAIL—*Defective—Consequent Liberty under Lord Rutherford's Act* (11 & 12 *Vict. c.* 36, *s.* 43.] Where the irritant and resolutive clauses do not fence the prohibition against altering the order of succession, the entail is ineffectual; even in a question *inter hæredes.* Hamilton *v.* Hamilton [12

2. —— *Strict—Relaxation of Fetters for the Benefit of Younger Children.*] A power to grant a certain number of years' free rent as a provision for younger children is an ordinary power in deeds of entail. It is introduced as an exception to the general restrictions. "Younger children" are those who are such at the death of the institute or heir in possession.—*Per* The Lord Chancellor [*Hatherley*]:—The Act of 1685, c. 22, and the *Rutherford Act*, 11 & 12 Vict. c. 36, both allow a provision for younger children in the form here adopted.—*Per* Lord *Westbury:* This deed of entail contains, with regard to the *corpus* of the estate, completely valid and effectual fettering clauses. The fetters are relaxed for the benefit of younger children, but in a manner which shall not admit of any alienation or mortgage of the *corpus.*

Procedure.] Judgment of the Lord Ordinary on one branch of the case. Judgment of the First Division on another branch, recalling the Lord Ordinary's judgment. Judgment of the House of Lords, recalling the judgment of the First Division, and restoring that of the Lord Ordinary.—*Per* The Lord Chancellor [*Hatherley*]: The First Division passed by the question on which the Lord Ordinary proceeded.—*Per* Lord *Chelmsford:* I cannot help regretting that we have not had the advantage of the opinions of the learned Judges of the First Division, as the case is one of the first impression; as to which their judgment would have been pre-eminently useful. Catton *v.* Mackenzie - - 202

3. —— *Distinct Stocks—Exhaustion of each—Succession thereon respectively.*] *Per* The Lord Chancellor [*Selborne*]: The whole issue, male and female, of each *stirps* is to be exhausted before resorting to the subsequent limitations. Forbes *v.* Trefusis - - - - 328

ENTAIL—*continued.*]

4. —— *Resolutive Clause.*] An entail impeached on the ground that by reason of doubtful words and ambiguous phraseology in the resolutive clause, it failed adequately to embrace and cover the cardinal prohibitions:—*Held* by the House (affirming the decree appealed from) that the resolutive clause was sufficient.—*Per* The Lord Chancellor [*Cairns*]: I cannot admit that there is to be applied to deeds of entail rules of construction differing from the rules of construction which are applied to other instruments. McDonald *v.* McDonald - - 446

—— Recorded — Saving of substitutes: *See* Treason.

—— Unrecorded — Loss to substitutes: *See* Treason.

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FACT—Appeal on matter of: *See* Appeal on Matter of Fact.

FACTORS, ADVANCES TO: *See* Advances to Factors.

FACULTY OR POWER.] When a deed, though affecting heritage, is executed under a power or faculty, it is not reducible: *See* Death-bed Deed.

FAMILY ARRANGEMENT: *See* Presumption. 1.

FATHER'S POWER OF APPOINTMENT UNDER HIS MARRIAGE SETTLEMENT—Where a father was, by his marriage settlement, empowered to divide at discretion the funds in which the children had an expectant interest:—*Held,* that he could not deal or negotiate with them in executing the power. *Per* The Lord Chancellor [*Hatherley*]: A parent in such a case purchasing the interests of the children, one of them being only eighteen years of age, is a transaction wholly inconsistent with that protection which the law of every civilised country affords to children; and would not be permitted without the fullest evidence of an intention authorizing it:—*Held,* reversing the decree below, that releases or discharges granted by the children to the father, in consideration of money payments made by him, formed no bar to their subsequent claims under the settlement,—such releases or discharges notwithstanding.

A Power may be executed without any Express Reference to it.] *Per* Lord *Chelmsford:* The donee of a power may execute it without referring to it, and without taking the slightest notice of it, provided the intention to execute the power really appears.

Appointments pro tanto.] The power may be exercised from time to time by several appointments, to suit convenience and promote advantage, as exigencies arise, or as expediency may suggest.—*Per* Lord *Westbury:* Some of the learned Judges of the Court below seem to have thought that the power required an execution *uno flatu,* once for all. If that were so, no appointment to a child, though settled in life, could take place

FATHER'S POWER OF APPOINTMENT UNDER HIS MARRIAGE SETTLEMENT—*continued.*
until all the other children, objects of the power, had attained maturity.

Special Judgment : its Precautions to terminate Litigation.] *Per* Lord *Westbury :* I am desirous that we should dispose of this case, so as not to leave any door ajar that may be pushed open for further litigation. CUNINGHAME *v.* ANSTRUTHER [223

FISH, RIGHT TO—Under a lease : *See* AGRICULTURAL LEASE.

FISHING, SALMON : *See* SALMON FISHING.

FISHINGS : Rights of opposite proprietors : *See* RIVER FISHINGS.

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FREIGHT, DEAD : *See* BILL OF LADING.

GENERAL DESCRIPTION—Words of construction—One of presumption : *See* PRESUMPTION. 3.

GENERAL POLICE AND TOWNS IMPROVEMENT ACT, 25 & 26 *Vict. c.* 101 (1862)—*Private Street—Notice required—The Litigation censured.*] Where any private street, or any part thereof, is not levelled, paved, causewayed, and flagged to the satisfaction of the Commissioners, they are authorized to remedy the evil at the expense of the owner; but they must be careful to give the special preliminary notice required by the 397th section of the Act : *Held*, by the House (agreeing with the Lord Ordinary, and reversing the decree of the Inner House), that a notice under the 394th section was insufficient.—Censure of a seven years' litigation, and disallowance of costs on both sides. *Per* The Lord Chancellor [*Hatherley*] : I think there should be no allowance of expenses either here or in the Court below—both parties having been in the wrong. CAMPBELL *v.* LEITH COMMISSIONERS - - - - - 1

GENERAL RAILWAY STATUTES—Effect of their incorporation in a special Act : *See* INTEREST UPON AN UNSETTLED CLAIM.

GENERAL TRAMWAYS ACT, 1870—*Edinburgh Tramways Act*, 1871.] The General Act of 1870 is to facilitate the construction and to regulate the working of tramways in *England* and *Scotland*. The *Edinburgh* Act of 1871 is to authorize the construction of street tramways in certain parts of *Edinburgh*, *Leith*, and *Portobello*.

Tramway-Rail and Footpath.] Case in which the rule that 9 feet 6 inches shall intervene between the tramway-rail and nearest foot-path was departed from by statutory authority; the House reversing the decree complained of.

Tramway Works—Recall of Interdict.] Relying on certain preliminary agreements, the frontagers of a narrow thoroughfare abstained from opposing the *Edinburgh Tramways Bill;* but as it turned out that the Act, when passed, allowed the very thing which the frontagers had been most anxious to prevent, thay asked and obtained from the Court of Session an interdict against its execution. But the House of Lords recalled the interdict, holding that the question was determined by

GENERAL TRAMWAYS ACT, 1870—*continued.*
the Statute, which the *Tramways Company* were not only entitled to carry out, but bound to obey.

Provisional Order from Board of Trade.] *Held*, also, that the same consequences would have arisen in the case of a provisional order from the Board of Trade, when confirmed by Parliament.

Deposited Plans and Sections.] When the Act directs compliance with deposited plans and sections, they are regarded as embodied in the statute. EDINBURGH STREET TRAMWAYS COMPANY *v.* BLACK - - - - - - 336

GUARDIAN AD LITEM—Appointment of, in cases of lunacy where divorce is sought or resisted : *See* DIVORCE. 2.

HEIR APPARENT : *See* ENTAIL. 3.

HEIR MALE—*Charge on him for Younger Children.*] Where, by ante-nuptial articles and post-nuptial settlement, the intending husband conveyed his estate to "himself and the heir male of the marriage," and bound himself, and his heirs and successors whomsoever, to pay £16,000 "to the younger child or children of the marriage," it was *held* by the House, affirming the decree below, that there should be no proportionate distribution of obligation between the heir and the younger children, but that the heir alone should make good the £16,000, although the estate which he inherited was worth only £28,000, and the free executory, or personalty, was but £1500.—*Per* The Lord Chancellor [*Hatherley*] : Taking as heir, there is nothing to shew that the Appellant is to be exempted from the ordinary conditions of heirship.—*Per* Lord *Westbury :* The moment you clothe the Appellant with the estate as heir he becomes a mark for the liabilities of the law. He takes *nomine et titulo hæredis*, and the obligations incident to the inheritance must be fulfilled by him. LESLIE *v.* MACLEOD - - - 44

—— Right to vote in respect of a peerage : *See* SCOTCH EARLDOM.

HEIRS MALE—Presumption in favour of : *See* DESCENT OF PEERAGES TO HEIRS MALE.

HERITAGE—Conveyance of—Indispensability of the word "dispone" : *See* CONVEYANCE OF HERITAGE.

HORSE—Difference between the English and Scotch law, on sale of : *See* SALE BY SAMPLE.

HUSBAND'S ADULTERY—Judicial separation—Custody of children—No general rule : *See* JUDICIAL SEPARATION.

HUSBAND'S RIGHT—Claim of creditors : *See* WIFE'S LEGITIM.

IMPRISONMENT FOR CONTEMPT OF COURT : *See* CONTEMPT OF COURT.

IMPROVEMENTS, STATUTORY : *See* STATUTORY IMPROVEMENTS.

INDORSERS—Bill of exchange—Discharge of the acceptors : *See* BILL OF EXCHANGE.

INSANITY—Whether of Petitioner or Respondent suing for, or resisting divorce : *See* DIVORCE. 2.

INSURANCE—Consequence of failure to insure: *See* Advances against Freight.

INTERCHANGE OF MATRIMONIAL WORDS—Kissing and "bedding": *See* Marriage. 2.

INTEREST UPON AN UNSETTLED CLAIM—Where a pecuniary claim has been left by the creditor for years unascertained and unexamined, the debtor having always been ready and willing to meet the demand, it was *held* by the House, reversing the decision below, that the right to interest on the principal sum did not commence until after the debt had been established, and the precise amount settled.—A sheriff's jury, awarding compensation to a landowner against a railway company in 1864, found that so far back as 1852 he was entitled to £5272; saying, however, nothing as to interest. The Court below added to the principal sum twelve years' interest. Their order reversed.—*Per* Lord *Westbury:* Interest can be demanded only in virtue of a contract, or where the principal money has been wrongfully withheld.

Cost of a Railway Compensation Trial.] By adding the twelve years' interest to the sum which the jury had awarded, it was made to exceed the original offer of the company, and, consequently, the Court below allowed the landowner his costs of the inquiry. Reversal by the House.

Sheriff's Jurisdiction.] The sheriff's jurisdiction in cases of railway compensation is exclusive and final.

Special Railway Act.] Where a railway company's special Act incorporated clauses of the general statutes, regulating ordinary proceedings, it was *held* that the ordinary course of proceeding should exclusively have place: and an action brought to alter what had been done in conformity with such ordinary proceeding, was declared by the House to have been *incompetent.* Caledonian Railway Company *v.* Carmichael 56

INVALID INSTRUMENT: *See* Conveyance of Heritage.

INVENTORY DUTY—5 & 6 *Vict. c.* 79, *s.* 23.] When the provisions in a marriage settlement constitute a debt, inventory duty is not chargeable.

Children's Provisions.] In a marriage settlement the husband became bound to make a provision for his children, the contract giving him a power of appointment, in the exercise of which power he appointed to one of his sons £10,000, which was duly paid to him. The executors claimed a return of duty in respect of this sum, on the ground that it constituted a *debt* of the deceased:—*Held*, that their contention was right, and that they were entitled to a return of £150. Lord Advocate *v.* Hagart - - - 217

JUDICIAL SEPARATION FOR HUSBAND'S ADULTERY—*Custody of the Children—No General Rule.*] *Per* The Lord Chancellor [*Cairns*]: The Act of Parliament (24 & 25 Vict. c. 86, s. 9) has given the Court the widest discretion to weigh the comparative advantages or disadvantages of giving the custody of all, or of any of the children, to the one parent, or to the other; and I am at a loss to conceive how any general rule can be laid down. It is the duty of the Court to consider all the circumstances of the particular case.

JUDICIAL SEPARATION FOR HUSBAND'S ADULTERY—*continued.*

The Sons committed to the Father—the Daughters to the Mother.] *Per* The Lord Chancellor [*Cairns*]: Grave as the offence in this case was, there appears to be no continuance of immorality. It is proved that the husband is affectionately attached to his children, and has always been so. He is engaged in a profitable business. I cannot perceive that an order which should take from him the custody of his sons would be conducive to their future welfare. It is a very different matter with regard to the daughters. Their mother, against whom nothing has been proved, is the natural person to have their custody.—*Per* Lord *O'Hagan*: The father did not lead an openly immoral life, but had the character of a religious and upright man. He had a genuine love for his children, and exhibited a watchful care of them; and there does not seem any reasonable ground for anticipating that the male children will be injured if their custody be with their father; especially as they are of sufficient age to be kept at school.—*Per* Lord *Selborne:* Looking to the moral interest of these boys, I am not satisfied that it will be compromised by leaving them in the care of him who is their natural and legal guardian, and on whom their material interest must mainly depend. Symington *v.* Symington - - - - - 415

KISSING AND "BEDDING"—Interchange of matrimonial words: *See* Marriage. 2.

LADING, BILL OF: *See* Bill of Lading.

LEASE—*Evidence—Construction.*] Where documents are obscure, but where parties have long acted on the footing of a given practical construction, the Court in the absence of better evidence, will accept that construction as correct Forbes *v.* Watt - - - - - 214

—— Mineral: *See* Mineral Lease.

—— Right to sport: *See* Agricultural Lease.

LIEN FOR DEAD FREIGHT: *See* Bill of Lading.

LIMESTONE AND COAL—Reservation of: *See* Minerals.

LIQUIDATOR—His position and power: *See* Companies Act, 1862.

LITIGATION—Censure of undue litigation: *See* Keith *v.* Reid, p. 39; Gray *v.* Turnbull, p. 53; Campbell *v.* Leith Commissioners, p. 1.

LOCAL ACTS EXEMPTING RAILWAYS FROM POOR-RATES, ABROGATED BY GENERAL ENACTMENT—Declaration by the House (reversing the decree below) that the provisions in the local Acts of 1836, exempting the *Dundee and Arbroath* and the *Arbroath and Forfar Railways* from poor-rates, were, in effect, abrogated by the *General Poor Law Amendment Act*, 1845, and by the *General Valuation of Lands Act*, 1854.—By the *Poor Law Amendment Act* of 1845 an entire railway is treated as a heritage to be valued *in cumulo*, and is, for the first time, made a distinct subject of taxation.—By the *Valuation of Lands*

LOCAL ACTS EXEMPTING RAILWAYS FROM POOR-RATES, ABROGATED BY GENERAL ENACTMENT—*continued.*

Act of 1854, the *cumulo* yearly rent of the lands held by railways in *Scotland* is first to be ascertained; and 3 per cent. for the cost of stations, wharves, &c., being deducted, the proportion of each parish becomes demandable from the respective companies.—In the *Edinburgh and Glasgow Railway Company* v. *Adamson* (15 Dunlop, 537), the remarks of the Lord President (now Lord *Colonsay*) concurred in. DUNCAN *v.* SCOTTISH NORTH EASTERN RAILWAY COMPANY - 20

LUGGAGE, responsibility of steam packet company for loss of: *See* STEAM PACKET COMPANY.

LUNACY: *See* DIVORCE. 2.

MARRIAGE—*By Consensual Declaration.*] A written declaration of marriage *de præsenti* signed by both parties and delivered by the man to the woman, conclusively establishes the contract.

Proof of Signature to the Declaration.] Circumstances under which it was held that direct proof of the wife's signature to the declaration was unnecessary, she possessing the document, and suing upon the faith of it for a declarator of marriage.

Promise Subsequente Copula.] The declaration might be regarded as a promise which when followed but not preceded by *copula* constitutes marriage. FORSTER *v.* FORSTER - - 244

2. —— *Interchange of Matrimonial Words—Kissing and "Bedding."*] After a family supper one of the party—a bachelor—put a ring on the finger of one of the daughters, a spinster, and said to her, "Maggie, you are my wife before heaven—so help me, oh God!" The two thereupon kissed each other, and Maggie said, "Oh, Major!" Their health was drunk, and they were forthwith "bedded," according to an obsolete Scotch fashion:—*Held* by the House of Lords, reversing the judgment of the Court of Session, that no marriage was contracted; it appearing clearly that no real marriage was then intended by either of the parties, although the ultimate maturing of matrimony and legitimation, under the Scotch law, of any issue that might be procreated in the interval, was hoped for and confidently anticipated by "Maggie" and her relatives.—*Per* The Lord Chancellor [*Cairns*]: The burden which lay on the Pursuer to establish her marriage has not been discharged. On the contrary, there has been presented a body of evidence, derived from documents written, acts done, and declarations made, all bearing with a strength irresistible against the marriage.—*Per* Lord *Selborne*: The Report of the Royal Commission states that "the most express declaration, oral or in writing, by both parties, that they are husband and wife, will not make them so, unless the Judge is satisfied that the inward intention of their minds was in accordance with those outward words or acts." I am sorry to say that in *Scotland* persons generally reputed to be respectable, though not fastidious, may sometimes reconcile their moral sense to the notion of an inchoate marriage, to be perfected by

MARRIAGE—*continued.*

the progress of events,—of which they expect a favourable issue. STEUART *v.* ROBERTSON 494

3. —— Nullity of, by reason of impotence—Delay in applying to the Court: *See* NULLITY OF MARRIAGE.

MINERAL LEASE—*Obligations of a*—When the thing let turns out to be a nonentity, the lessee is not bound.—*Per* The Lord Chancellor [*Selborne*]: In such a case it is perfectly reasonable that the lease should be subject to reduction.—*Per* Lord *Chelmsford*: Where there is a total destruction or exhaustion of the subject matter of a lease, the lessee is entitled to abandon it.

Perils of the Lessee.] *Per* The Lord Chancellor [*Selborne*]: The lessee of a mine, although entitled to rely on the existence of the subject matter, takes all risk of its failure, either as to quantity or value, unless either is expressly warranted.

Unworkability to Profit.] At common law, the mere fact of "unworkability to profit" affords no ground for reducing or throwing up a lease of minerals, which are in their nature subject to many vicissitudes. There is in such a case no legal warranty on which the lessee can rely.

Difference between Mineral and Agricultural Leases.] *Per* Lord *Cairns*: What we term a mineral lease is really a sale out and out of a portion of the land. *Dicta* therefore applicable to agricultural leases are not always applicable to leases of minerals. GOWAN *v.* CHRISTIE 273

MINERAL WORKINGS—Effect of an express reservation in a feu grant: *See* CONTRACT. 2.

MINERALS—*Charter reserving—Right to make underground Passages.*] Where in a feu charter the superior reserves the coal and limestone with the right to work them, giving satisfaction for damage, the right reserved is a right of property, or absolute ownership, and not a mere servitude or easement; the surface and the minerals becoming separate tenements severed in title.—*Held* by the Lord Chancellor [*Hatherley*], Lord *Westbury*, and Lord *Colonsay* (reversing the decree below), that in such a case the superior, as absolute proprietor of the reserved coal and limestone, may make a tunnel through them for the conveyance of other minerals belonging to him in the lands adjacent.—*Per* Lord *Colonsay*: It is a great mistake to say that the proprietor has no right to use those minerals except for the purpose of bringing them to the surface. He may use them in the way most beneficial to himself. To say that he is carrying the minerals through another man's property is a mistake. He is carrying them through his own.—Lord *Chelmsford, contrà*: The result of my consideration is, that although minerals excepted out of a grant may be regarded as an estate or tenement separate from the surface land, yet the property in them is of a peculiar and limited character; and very difficult questions will arise if the doctrine of absolute ownership is adopted. HAMILTON *v.* GRAHAM - - - - - 166

NET AND COBLE, fishing by: *See* SALMON FISHING.

NOTICES OF STATUTORY IMPROVEMENTS: *See* Statutory Improvements Commissioners.

NULLITY OF MARRIAGE—*Impotence—Onus of Proof.*] In a suit for declaration of nullity of marriage by reason of alleged impotence, the onus of proof is on the complainant.

Delay in applying to the Court.] The objection of delay in asking relief may be got over when the proof of impotence is complete; but not otherwise.

Strictness of the Court in interposing.] *Per* The Lord Chancellor [*Selborne*]: To open the door to lax and easy declarations of matrimonal nullity would be a grave public mischief; and it is therefore imperative to proceed only upon strict and thoroughly satisfactory proof. Cuno *v.* Cuno [300

OBLIGATIONS OF A MINERAL LEASE: *See* Mineral Lease.

ORDER OF SUCCESSION—Alteration of, not sufficiently prohibited: *See* Entail. 1.

ORDINANCE BY HIGH COMMISSIONERS IN 1634 relied upon by the House though rejected below: *See* Teinds. 1.

PARTNERS, power of individual: *See* Signature of a Partnership Firm.

PASSAGE UNDERGROUND: *See* Minerals.

PASSENGER—Loss of luggage—Responsibility of company: *See* Steam Packet Company.

PEERAGE, right to vote in respect of a: *See* Scotch Earldom.

PENALTIES FOR FRAUDULENT PREFERENCES: *See* Bankruptcy.

PERSONALTY NOT WITHIN THE ENTAIL STATUTE: *See* Appointment.

POOR-RATES — RAILWAYS — Exemption from poor-rates abrogated by general enactment: *See* Railways. 1.

POWER—Appointment with directions and conditions unsanctioned by the: *See* Appointment.

POWERS UNDER A MARRIAGE SETTLEMENT —When to be executed: *See* Father's Power.

PRACTICE—An agreement to settle by arbitration excludes the jurisdiction of the Courts. Caledonian Railway Company *v.* Greenock and Wemyss Bay Railway Company.
See Compulsory Reference to Arbitration.

2. —— When a judge, in the legitimate exercise of his jurisdiction, is defiantly disobeyed, he may commit the offender instantly to prison. Watt *v.* Ligertwood.
See Contempt of Court.

3. —— Construction of documents.
See Lease.

4. —— Judgments to be consistent with the manner in which the cases are pleaded;
See Appeal on Matter of Fact.
See Rectification of the Decree below.

PREFERENCE, FRAUDULENT: *See* Advances to Factors; Bankruptcy.

PRESCRIPTIVE ENJOYMENT—Salmon fishing: *See* Salmon Fishing.

PRESUMPTION *of Individual Competency.*] It is not easy to overcome the presumption that a man of mature age, who has long acted as a legal practitioner, is competent in an ordinary transaction to take care of himself, though unassisted by counsel. But there is an equity which in certain circumstances will give relief even to such an individual.

Family Arrangement.] Thus in a family arrangement where near relatives—some having authority—contract with each other, a high and punctilious probity will be expected; and equity will interpose to do justice on very moderate indications of laxity. *Per* Lord *Westbury:* In family agreements it is required that there shall be on all sides *uberrima fides.*

Inadequacy of Consideration.] *Per* Lord *Westbury:* There is an equity which may be founded on gross inadequacy of consideration, where it involves the conclusion that the complainant either did not understand what he was about, or was the victim of some imposition. But in the present case there is nothing to warrant either of these deductions.

Scotch Statute of 1696, *c.* 25, *as to Trusts.*] Circumstances under which it was held that this statute did not prevent the reception of oral evidence. Tennent *v.* Tennents - - - 6

2. —— In peerage cases the presumption is in favour of heirs male. Herries Peerage - 258

3. —— *Against Change of Destination.*] *Per* Lord *Colonsay:* The rule of Scotch law in regard to heritable property is, that a destination once made is not easily presumed to have been altered or innovated.

Words of General Disposition.] *Per* Lord *Colonsay:* In determining what effect should be given to words of general disposition, the question has always been treated as one of presumption or presumed intention.

Extrinsic Evidence of Intention.] *Per* Lord *Colonsay:* The Court takes into consideration circumstances calculated to throw light on the intention, whether found in the deed or collected from external circumstances. *Per* The Lord Chancellor [*Selborne*]: I am bound to acknowledge that evidence of this kind appears to have been received, and to have been more or less relied upon, in two Scotch cases which came before this House in Lord *Hardwicke's* time. Glendonwyn *v.* Gordon - - - - - - 317

PRINCIPAL UNASCERTAINED — Interest on: *See* Interest on an Unsettled Claim.

PROCESS CAPTION—When it may be properly issued without prior notice: *See* Contempt of Court.

PROMISE OF MARRIAGE, AND SUBSEQUENTE COPULA: *See* Marriage. 1.

PROPERTY DISTINGUISHED FROM SERVITUDE: *See* Minerals.

PROVISION FOR WIDOW UNDER ENTAIL— Relief of the heir: *See* Widow's Provision.

PUBLIC HOUSES—CLOSING HOURS OF—25 & 26 *Vict. c.* 35.] Eleven o'clock at night is the hour appointed for closing public houses in *Scotland*, although in special cases, and for well-considered reasons, a deviation is allowed with reference to "any particular locality" really requiring it.—An order by the magistrates of *Rothesay* for closing at ten, instead of eleven, though limited by its words to a "particular locality" embraced every public house in the burgh:—*Held*, by the House, agreeing with the Court below, that the magistrates' order was *ultra vires*. MACBETH *v.* ASHLEY [352

PURCHASE BY SAMPLE: *See* SALE BY SAMPLE.

RAILWAYS—*Poor Rates—Local Acts overruled.*] Declaration that local Acts are overruled by the *General Poor Law Amendment Act*, 1845, and by the *General Valuation of Lands Act*, 1845. DUNCAN *v.* SCOTTISH NORTH EASTERN RAILWAY - 20

2. —— *Taxation under Poor Law Amendment Act.*] An entire railway is treated as an heritage to be valued *in cumulo*. DUNCAN *v.* SCOTTISH NORTH EASTERN RAILWAY - - - 20

3. —— Compensation: *See* COMPENSATION UNDER THE RAILWAY STATUTES; INTEREST UPON AN UNSETTLED CLAIM - - -

4. —— *Statutes—Clauses as to "Superfluous Lands" and as to Lands for "Extraordinary Purposes."*] Lands taken compulsorily by the promoters of a railway, unless used or disposed of within the statutory period, are deemed "superfluous lands;" and as such vest in the adjoining owners. But this statutory rule has no application to lands acquired by voluntary agreement for "extraordinary purposes" arising incidentally.—The distinction is observable in the English as well as the Scottish enactments.—*Per* Lord *Westbury*: We naturally expect that lands taken by compulsory powers, if not wanted by the railway, shall be restored. But the company is left to deal with lands which they have acquired by private treaty as any ordinary proprietor may do. CITY OF GLASGOW UNION RAILWAY COMPANY *v.* CALEDONIAN RAILWAY COMPANY - - - 160

RECTIFICATION OF THE DECREE BELOW TO SUIT THE PLEADINGS.] The House varied the decree complained of, so as to base it on the language and substance of the pleadings.—*Per* The Lord Chancellor [*Cairns*]: The majority of the Court below place the case not on the footing of a reference to arbitration and an award, but on the footing of an agreement. Both parties, however, having treated the case as one of reference and arbitration, and the Court below having accepted the pleas to that effect, I think they should have based their decision upon those pleas.—*Per* Lord *Selborne*: It is very important that the judgments of the House should be consistent with the manner in which the cases are pleaded by the parties. PARISH OF RUTHVEN *v.* PARISH OF ELGIN 535

REDUCTION EX CAPITE LECTI: *See* DEATH-BED DEED.

REFERENCE TO THE ARBITRATION OF A FLUCTUATING BODY.] The "*Society of Inspectors of Poor for Scotland*," an unincorporated and fluctuating body, held to be proper arbitrators of a question referred to them by two parishes

REFERENCE TO THE ARBITRATION OF A FLUCTUATING BODY—*continued.*

as to the maintenance of a pauper.—*Per* The Lord Chancellor [*Cairns*]: There is nothing in law that I have discovered to prevent a valid reference to the arbitration of such a body as the *Society of Inspectors of Poor for Scotland*:—*Per* Lord *Hatherley*: The benchers of the Inns of Court decide matters of the gravest importance; and yet they are not a corporation, but a fluctuating body. PARISH OF RATHVEN *v.* PARISH OF ELGIN - 535

RESERVATION OF COAL AND LIMESTONE: *See* MINERALS.

RESIGNATION OF A BASE RIGHT—Distinguished from merger: *See* RIVER FISHINGS.

RESOLUTIVE CLAUSE—Entail: *See* ENTAIL. 4.

RESPONSIBILITY OF STEAM PACKET COMPANY FOR LOSS OF LUGGAGE: *See* STEAM PACKET COMPANY.

RETAIL SHOP—*Auctions, when allowable.*] In a retail shop sales by auction are allowable unless prohibited by the agreement between the landlord and tenant.—So *held* by the House of Lords, reversing a judgment of the Court of Session, which had ruled (*diss.* the Lord Ordinary and Sheriff) that in a retail shop sales by auction were *not* allowable, unless permitted by the agreement.—*Per* Lord *Westbury*: To hold that under the lease of a shop, a back shop, and a cellar, there is necessarily inherent in the subject a prohibition against the use of it for the sale of goods occasionally by public auction, is a proposition which, I think, cannot be sustained.

The Litigation—Regret expressed.] *Per* The Lord Chancellor [*Hatherley*]: Mrs. *Reid* is to be pitied for the course into which she has been dragged—evidently without any consciousness on her part of the extreme folly of these proceedings. KEITH *v.* REID - - - - - 39

RETURN OF INVENTORY DUTY — Ordered, when erroneously charged: *See* INVENTORY DUTY.

REVOCATION OF DEED—Invalid instrument of conveyance—Intention to revoke: *See* CONVEYANCE OF HERITAGE.

RIVER FISHINGS—*Rights of Opposite Proprietors.*] Where independent proprietors on the opposite banks of a river have rights respectively of fishing in the stream, each is entitled to fish from the bank of each, *usque ad medium filum.*

Case of a Shifting Island in the Channel.] If a shifting island springs up in the channel so as to impede or embarrass the fishings of one of the proprietors, he must submit, and hope for a change. The law can give him no redress. But if the shifting island becomes fixedly annexed to, and incorporated with, his bank, the permanent accretion will give rise to a new *medium filum.*

Salmon Fishing—Base Right.] Where a base right to salmon fishing has been followed by forty years' possession and enjoyment it is unimpeachable.

Resignation of a Base Right.] *Per* Lord *Westbury*: A thing surrendered by English law, so as to produce merger, is lost and destroyed; but a thing resigned by Scotch law is not lost, but

RIVER FISHINGS—*continued.*
simply surrendered to the superior. Zetland *v.* Glover Incorporation - - - - 70

RUTHERFORD'S (LORD) ACT—Defective entail —Consequent liberty: *See* Entail. 1.

SALE BY SAMPLE—*Privileges and Obligations of the Purchaser.*] The purchaser of goods by sample ought to examine them without delay; and if he find that they are not conformable to the sample, he may reject them and rescind the contract,—giving immediate notice that he does so, and that the goods are at the risk and disposal of the vendor.—Should the vendor not acquiesce, the purchaser should place the goods in neutral custody, duly apprising the vendor.—The purchaser is not entitled to hold by the contract and ask for other goods instead of those to which he objects.—Where in such a case certain purchasers] had omitted to rescind the contract, and neither returned nor offered to return the goods, they were held liable for the price.—*Per* Lord *Chelmsford:* As I understand the law of *Scotland*, although the goods have been accepted by the purchaser, yet if he find that they do not correspond with the sample, he has an absolute right to return them. In *England*, if goods are sold by sample, and they are delivered, and accepted by the purchaser, he cannot return them; but if he has taken the delivery conditionally, he has a right to keep the goods for a sufficient time to enable him to give them a fair trial,—and if they are found not to correspond with the sample, he is then entitled to return them.—*Per* Lord *Chelmsford:* In *England*, if a horse is sold with a warranty of soundness, and it turns out to be unsound, the purchaser cannot return the horse unless there is a stipulation that if the horse does not answer to the warranty the purchaser shall be at liberty to return it. But in *Scotland*, as I understand the law of that country, there would be an absolute right to return the horse upon the discovery of its unsoundness, without any specific stipulation to that effect. Couston *v.* Chapman - - 250

SALMON FISHING.] *Per* The Lord Chancellor [*Cairns*]: The title, being baronial, will be a *habile* foundation for a claim to salmon fishing if the requisite enjoyment and user be established. A title by grant *cum piscationibus* will suffice if supported by the requisite enjoyment and user.

Prescriptive Enjoyment—Net and Coble—Stake-net.] The prescriptive forty years' enjoyment may be by net and coble, as well as by stake-net.—*Per* The Lord Chancellor [*Cairns*]: I cannot recognise the principle that stake-net fishing is the ordinary and well-understood mode of salmon fishing in the sea.—*Per* Lord *Hatherley:* The mode must vary from time to time as improvements are suggested. McDouall *v.* Lord Advocate - - - - - - 431

SCOTCH EARLDOM—*Heir Male.*] The pedigree shewing clearly the claimant's title as the nearest heir male of the *Breadalbane* family:—*Held*, that his claim was "made out."

Right to Vote in respect of a Peerage.] Under the 10 & 11 Vict. c. 52, s. 4, when the right to a peerage or the right to vote in respect of a peerage is established and notified to the Lord Clerk Registrar by order of the House of Lords, no one except the individual whose right is so established shall during his or her life be allowed to vote in respect of such peerage until the House of Lords shall otherwise direct. Breadalbane Peerage [269

SCOTCH EARLDOM—*continued.*

SERVITUDE DISTINGUISHED FROM PROPERTY: *See* Minerals.

SETTLEMENT ON MARRIAGE—The claims of the children not to be bargained away: *See* Father's Power of Appointment.

SHAREHOLDER: *See* Contract. 1.

SHERIFF'S JURISDICTION IN RAILWAY COMPENSATION CASES: *See* Interest on an Unsettled Claim.

SHIFTING ISLAND IN A RIVER—Affecting opposite proprietors: *See* River Fishings.

SHIP MEASUREMENT—17 & 18 *Vict. c.* 104—*Awning over Main Deck—Tonnage.*] Where over the main deck of a ship there was a covering or awning open at the sides, and unfit for the carriage of cargo, passengers, or crew, it was *held* by the House, affirming the decision appealed from, that tonnage was not chargeable in respect of such covering or awning as if it were a third deck.—*Per* The Lord Chancellor [*Cairns*]: I am of opinion that the ship in this case has not a third deck, available for cargo, or for the berthing or accommodation of passengers or crew.—*Per* Lord *O'Hagan:* The measurement of the ship's tonnage should be in accordance with her carrying capacity. Lord Advocate *v.* Clyde Steam Navigation Company - - - 409

SIGNATURE OF A PARTNERSHIP FIRM OR NAME BY THE MANAGER.] The manager of a company is not entitled, as such, to sign the firm or name of the partnership:—*Held* by the House (agreeing with the Court below), that the authority of trustees representing three-fourths of the property of the concern was insufficient to empower a manager, as such, to sign the company's firm, especially when the proceeding was opposed by the representative of the remaining fourth.

Comments by the Law Peers on the Administration of a Company's Manager.] Censure of the manager's conduct in leaving signed cheques, blank as to the amount, in the hands of clerks to be used by them at discretion.—Censure of the manager's conduct in depositing the company's cash, to a large amount, in certain banks without the consent of all the partners.—Declaration by the House (disagreeing with the Court below) that a manager had exceeded his legitimate powers in increasing the wages of the company's servants, and also in substituting, for the original, more expensive machinery without the consent of the partners.

Question left undecided as to Powers of Individual Partners.] Whether an individual partner can institute a suit or bring an action in the name of the partnership, the House deemed it unnecessary to decide. Beveridge *v.* Beveridge [183

SIGNATURE TO A DECLARATION OF MARRIAGE — Proof required: *See* Marriage. 1.

SPORT—Right under an agricultural lease: *See* Agricultural Lease.

STAKE NET—Salmon fishing—Prescriptive enjoyment: *See* Salmon Fishing.

STATUTES:

Scotch Acts:

—— 1573, c. 55 - - - - 192
—— 1633, c. 19 - - - - 372
—— 1685, c. 22 - - - - 202
—— 1690, c. 33 - - - - 142
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5 Anne, c. 8 - - - - 139
7 Anne, c. 20 - - 144, 150, 153
19 Geo. 2, c. 26 - - - - 146
20 Geo. 2, c. 41 - - - 147, 150
24 Geo. 2, c. 41 - - - - 141
25 Geo. 2, c. 41 - - - 141, 147
24 Geo. 3, c. 57 - - - 141, 150
4 Geo. 4, c. 83 - - - 114, 115
5 Geo. 4, c. 87 - - - 14, 315
6 Geo. 4, c. 94 - - - 114, 115
6 Geo. 4, c. 120 - - - 73, 255
9 Geo. 4, c. 58 - - - - 352
11 Geo. 4 & 1 Will. 4, c. 68 - - 481
5 & 6 Vict. c. 39 - - - - 113
5 & 6 Vict. c. 79 - - - - 217
8 & 9 Vict. c. 33 - - - - 348
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10 & 11 Vict. c. 52 - - - 269
11 & 12 Vict. c. 36 - - - 12, 202, 208
16 & 17 Vict. c. 67 - - - - 352
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17 & 18 Vict. c. 31 - - - - 481
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19 & 20 Vict. c. 79 - - - 120
20 & 21 Vict. c. 85 - - 376, 420
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24 & 25 Vict. c. 86 - - 415, 438, 442
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25 & 26 Vict. c. 101 - - 1, 107
31 & 32 Vict. c. 100 - - - 310
31 & 32 Vict. c. 101 - - 396, 400
32 & 33 Vict. c. 68 - - - 301
33 & 34 Vict. c. 78 - - - 336

STATUTORY COMPENSATION—*Per* Lord *Chelmsford:* A man may have a right of action and a right of indictment where he cannot claim statutory compensation. City of Glasgow Union Railway *v.* Hunter - - - - 78

STATUTORY IMPROVEMENTS COMMISSIONERS—*How far bound by their Contracts.*] These Commissioners are not invested with judicial or even *quasi*-judicial authority. They are to act according to the best of their judgment for the promotion of the objects prescribed; and in the performance of their duty they may enter into reasonable negotiations and contracts, which will bind them, and hold good permanently, unless

STATUTORY IMPROVEMENTS COMMISSIONERS—*continued.*

subsequently displaced under the statutory provisions.—Where the Commissioners had accepted an offer made to arrest litigation; where the acceptance was carried by only fourteen votes against thirteen; and where they afterwards repudiated the contract as likely to prove injurious to the public interest—the House (reversing the decree below) decreed a specific performance, on the ground that the party with whom the agreement was made had relied and had acted upon it, and that they were bound by it.

Statutory Notices.] Notwithstanding the contract the commissioners must, at the proper time, give the notices required by the statute.—*Per* The Lord Chancellor [*Hatherley*]:—Notices will have to be issued; so that all parties entitled to object may come forward.—*Per* Lord *Colonsay:* All that the Commissioners do is subject to the qualifications and conditions of the Act of Parliament. Smeaton *v.* Magistrates of St. Andrews [107

STEAM PACKET COMPANY'S RESPONSIBILITY FOR LOSS OF LUGGAGE.] A ticket, having on its face only the words "*Dublin* and *Whitehaven*," was given to a passenger, who, without looking at it, paid for it, and went on board. Having lost all his luggage he brought an action against the company. *Defence* of the company, that on the back of the ticket there was an intimation that they were not to be liable for losses of any kind or from any cause. Judgment against the company with costs.—*Per* The Lord Chancellor [*Cairns*]:—It would be extremely dangerous to hold that where a document is complete on the face of it, but having on the back of it something which has not been brought to the knowledge of a contracting party, he shall be held to have assented to that which he has not seen and of which he knows nothing.

Passenger's Assent.] *Per* Lord *Chelmsford:* A mere notice from the steam packet company without the passenger's assent will not discharge them from performing the very essence of their duty, which is to carry safely and securely, unless prevented by unavoidable accidents.—*Per* Lord *Hatherley:* A ticket is in reality nothing more than a receipt for the money which has been paid.—*Per* Lord *O'Hagan:* When a company desires to impose special and stringent terms upon its customers, there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted. Henderson et al. (Steam Packet Company) *v.* Stevenson [470

STIRPS—Exhaustion of: *See* Entail. 3.

STREET, PRIVATE—Improvement of—Notice required: *See* General Police and Towns Improvements Act.

STRICT ENTAIL: *See* Entail. 2, 3.

SUBSTITUTES: *See* Treason.

SUPERFLUOUS LANDS: *See* Railways. 4.

TEINDS, OR TITHES—*Valuation binding, though Minister not cited.*] *Held* by the House (reversing the decree below), that certain valuations of teinds in 1683, 1684, 1690, and 1697, though made in the

TEINDS—*continued.*
absence of the ministers affected, were binding on their representatives in the present day, and barred their suit for augmentation of stipend.—Where the interest of the ministers, not cited, was identical with the interest of the titulars who were parties to the proceedings (the interest of the titulars being the higher of the two), and where, moreover, there was no suggestion of collusion or unfairness,—valuations made in the seventeenth century, which have stood ever since, and been acted upon, must now have full effect.

High Commissioners' Ordinance of 1634.] This ordinance, declaring it "unnecessary to summon the minister to a valuation," *held* sufficiently proved, and relied upon by the House as genuine —though rejected by the Court below (Lord *Curriehill diss*). Forbes *v.* Smith - - 89

2. —— *Claim of By-gone—Defence—Bonâ fide perceptio et consumptio, Held sufficient.*] A demand of thirty years' arrear of tithes was met by the plea of *bonâ fide perceptio et consumptio:* —*Held* by the House (affirming the decree appealed from) that the defence was sufficient.—*Per* The Lord Chancellor [*Cairns*]: Perception in good faith and in complete ignorance of any adverse title, is a sufficient defence against a claim for the recovery of by-gone teinds.—*Per* Lord *Chelmsford:* I have no doubt whatever that the plea of *bonâ fide perceptio et consumptio* has been satisfactorily established.—*Per* Lord *Selborne:* I cannot help regretting that the doctrine of *bonâ fide perceptio et consumptio*, which is shewn to be part of the law of *Scotland*, is not also, to an equal extent, part of the law of *England*. It seems, moreover, to be a principle especially applicable to a claim for a long arrear of teinds. Lord Advocate *v.* Drysdale - - 368

TOCHER: *See* Divorce. 1.

TOWNS IMPROVEMENT—Notice required: *See* General Police and Towns Improvement Act.

TONNAGE—17 & 18 *Vict. c.* 104—*Ship Measurement—Awning over Main Deck.*] Where over the main deck of a ship there was a covering or awning open at the sides, and unfit for the carriage of cargo, passengers, or crew, it was *held* by the House, affirming the decision appealed from, that tonnage was not chargeable in respect of such covering or awning as if it were a third deck:—*Per* The Lord Chancellor [*Cairns*]: I am of opinion that the ship in this case has not a third deck, available for cargo, or for the berthing or accommodation of passengers or crew.—*Per* Lord *O'Hagan:* The measurement of the ship's tonnage should be in accordance with her carrying capacity. The Lord Advocate *v.* Clyde Steam Navigation Company - - 409

TRAINS OF RAILWAY—Damage from: *See* Compensation under Railway Statutes.

TRAMWAYS ACT (*Edinburgh*)]. Rule as to a width of 9 feet 6 inches departed from. Deposited plans and sections regarded as embodied in the statute. Edinburgh Street Tramways Company *v.* Black - - - - - 336

TREASON — *Attainder — Forfeiture.*] Under a strict entail, *duly recorded*, the possessor's attainder for high treason affects only himself and the heirs of his body; leaving substitutes untouched.—But under any entail, *not duly recorded*, the possessor's attainder for high treason vests the estate in the Crown absolutely out and out, the interests of substitutes perishing. These consequences will arise, although the attainted possessor may have made up no title, and is merely in apparency; the estate vesting in the Crown at once and completely by virtue of its supereminent title. Perth *v.* Elphinstone 139

TRUSTS, SCOTCH STATUTE OF, 1696, c. 25, not always excluding oral testimony: *See* Presumption. 1.

TUNNEL FOR MINERALS: *See* Minerals.

VALUATION OF TEINDS—In absence of stipendiary: *See* Teinds. 1.

WIDOW'S PROVISION—*Heir of Entail relieved.*] Case in which it was held by the House, reversing the judgment appealed from, that an heir of entail was entitled to be relieved from the provisions in favour of the widow of the testator—the maker of the entail:—*Per* Lord *Colonsay:* The purpose was that the estate should be launched under the entail free from debt, and that the widow's provision should be satisfied out of the testator's general property, which was ample. Mackintosh *v.* Mackintosh - 310

WIDOW AND YOUNGER CHILDREN—Provision for—Set aside by the heir of entail in possession: *See* Death-bed Deed.

WIFE, A LUNATIC, SUED FOR DIVORCE: *See* Divorce. 2.

WIFE'S LEGITIM—*Husband's Right—Claim of Creditors.*] The *legitim* of the wife is the property of her husband and subject to his debts. A provision without consideration in a post-nuptial contract that the income of the *legitim* "should be alimentary and in nowise attachable for debt," held insufficient to exclude the claim of the husband's creditors, he having become bankrupt. —*Per* The Lord Chancellor [*Cairns*]: A stipulation of this kind in a post-nuptial contract is neither valid nor permissible.—*Per* Lord *Hatherley*: A man cannot so deal with his own property as to make a provision to the detriment and defeating of his creditors.—*Per* Lord *O'Hagan*: No man is permitted to filch his own income from the hands of his creditors.—The *Conjugal Rights Act* (24 & 25 Vict. c. 86) held inapplicable, as the bankruptcy was anterior. Learmouth *v* Miller [438

YOUNGER CHILDREN—Charge on the heir enforced in their favour: *See* Heir Male.

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